No. 90-391

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In The

Supreme Court of the United States

October Term, 1990

LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT R-7, SCHOOL DISTRICT OF THE CITY OF INDEPENDENCE, NORTH KANSAS CITY SCHOOL DISTRICT, MEMBERS OF THEIR RESPECTIVE BOARDS OF EDUCATION AND SUPERINTENDENTS, et al.,

Petitioners,

v.

JENNIFER T. NAYLOR, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a unitary school district which, it was judicially determined, did not cause segregation in another school district violate the Fourteenth Amendment by declining to participate in a "voluntary", cross-district transfer program intended to create racial balance between the two school districts?

2. May a federal court coerce a local government with no history of racial discrimination to participate in a "voluntary" affirmative action program established by the federal courts?

LIST OF PARTIES

The parties to the proceedings below were petitioners: (1) Lee's Summit Reorganized School District R-7; (2) School District of the City of Independence; (3) North Kansas City School District; and (4) those districts' superintendents of schools and members of their boards of education.* Also parties to the proceedings below were respondents, a class of 134 school children residing in the Kansas City, Missouri School District represented by

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* The individuals named in the proceedings below as superintendents and members of the boards of education are: (a) *Lee's Summit Reorganized School District R-7*: Superintendent Gail Williams; Robert Jones, Robert Bruce, James Coleman, John Patterson, Margaret Piepergerdes, and Sherry Sims as members of the board of education; (b) *School District of the City of Independence*: Superintendent Robert Henley; Sharon Williams, Helen French, Michael Barnett, Ronald Sinke, Sharon Floyd, and Phillip Parrino as members of the board of education; and (c) *North Kansas City School District*: Superintendent S. Gene Denisar; Freddie Nichols, Rick Moore, Sandra Clark, Mary Smith, Bill Trickey, Joe Jacobs, and Wes McCullough as members of the board of education. Petitioners do not own and are not owned by any corporations.

LIST OF PARTIES-Continued

Jennifer T. Naylor; the State of Missouri, and various state officials.**

** The named members of that class of respondents are: Jennifer T. Naylor and Eric J. Naylor, by their next friend Rev. James Naylor; Dwayne Shores, by his mother and next friend Rose Shores; Adrian R. Dean, Tanisha M. Johnson, Andrea L. Johnson, and Gregory T. Johnson, by their mother and next friend Patience M. Johnson; Kevin D. Innis, by his mother and next friend Linda Innis; Deidra Jovan Rayfield, by her mother and next friend Latricia Rayfield McArn; Nicole R. Griffith, by her father and next friend Raymond B. Griffith, Sr.; Chrissean King, by his mother and next friend Pattie King; Ronale M. Dunn, by his mother and next friend Janice Dunn; LaShonda M. Gross, by her father and next friend Michael L. Gross; Jerry Steve Roggett, by his grandmother and next friend Martha M. Anderson; Bryant Tucker, by his mother and next friend Gladys Tucker.

The officers and representatives of the State of Missouri named below are: Governor John Ashcroft; Treasurer Wendell Bailey; Commissioner of Education Robert Bartman; and Roseann Bently, Dan Blackwell, Terry Bond, Delmar Cobble, Grover Gamm, Jimmy Robertson, Robert Weiling and Donald West, as members of the Missouri State Board of Education.

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Petitioners,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on May 23, 1990.

[1] "Petitioners" is used throughout this petition to include all three school districts, their superintendents and members of their boards of education.

OPINIONS BELOW

The final opinion of the Court of Appeals for the Eighth Circuit's panel is reported at 904 F.2d 415, and is reprinted in the appendix, pp. 1-25a, *infra*. This opinion was substituted for a withdrawn opinion, which is reported at 900 F.2d 1174, and is reprinted in the appendix, pp. 1-25b, *infra*. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, including the dissenting opinions of Judges Bowman and Wollman, has not been reported. It is reprinted in the appendix, pp. 1-8c, *infra*.

The memorandum opinion and order of the United States District Court for the Western District of Missouri (Stevens, D.J.) is reported at 703 F. Supp. 803, and is reprinted in the appendix, pp. 1-49d, *infra*.

JURISDICTION

Invoking 28 U.S.C. §§ 1331, 1332 and 1343, respondents filed this action in the United States District Court for the Western District of Missouri. The District Court granted summary judgment against respondents and awarded sanctions against their counsel. Respondents and their counsel appealed to the United States Court of Appeals for the Eighth Circuit.

On April 2, 1990, an Eighth Circuit panel comprised of Chief Judge Lay and Judges Heaney and Gibson entered judgment reversing the District Court and issued an opinion. Petitioners sought rehearing and suggested rehearing en banc. On May 23, 1990, the panel entered an

order withdrawing its April 2, 1990 opinion, entering a new judgment and issuing a new opinion. The Eighth Circuit denied rehearing and rehearing en banc that same day. Dissenting from the denial of rehearing en banc, Judge Bowman issued an opinion which was joined by Judge Wollman.

On June 18, 1990, Justice Blackmun extended the time for filing this petition for certiorari to and including August 30, 1990.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Preliminary Statement. Respondents, plaintiffs below, are a class of 134 black students residing in the Kansas City, Missouri School District (KCMSD). Petitioners are three other school districts in the Kansas City metropolitan area. It was judicially determined that all three petitioners are unitary, independent and autonomous school districts. Similarly, it was determined that all

three petitioners were innocent of any interdistrict constitutional violations. *Jenkins v. Missouri*, 807 F.2d 657, 661, 663, 669 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987).[2] Nevertheless, respondents' complaint contended petitioners violated the Fourteenth Amendment by not participating in a "voluntary" interdistrict transfer plan whereby black (but not white) students could transfer from KCMSD to petitioners' schools. This plan, an affirmative action program in effect, was conceived and devised by the federal courts. To place this extraordinary theory and the "voluntary" transfer plan upon which it relies in context, a brief summary of the prior *Jenkins* litigation is necessary.

B. Prior *Jenkins* Litigation and Origins of the "Voluntary", Interdistrict Affirmative Action Plan. When *Jenkins* was filed in 1977, it alleged cross-district (or interdistrict) violations by petitioners (as well as by other districts in both Missouri and Kansas) and sought a massive, mandatory interdistrict remedy consolidating petitioners and KCMSD. Alternatively, intradistrict relief in KCMSD was sought. *See* 807 F.2d at 660.[3]

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[2] This Court has reviewed issues arising out of *Jenkins* twice, most recently last term. *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990) (tax increases ordered by federal court to fund intradistrict desegregation remedy); 109 S. Ct. 2463 (1989) (attorneys' fees). The issues presented by this petition, because they extend beyond the field of public education, are equally worthy of this Court's review and, indeed, more so.

[3] In addition to petitioners, *Jenkins*'s plaintiffs alleged cross-district violations against ten other school districts in Missouri and five school districts in Kansas. The District Court held that it lacked jurisdiction over the Kansas districts.

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Both the interdistrict and intradistrict issues were tried in the Western District of Missouri. At the close of plaintiffs' evidence, the District Court, Judge Russel G. Clark, found no proof of interdistrict violations under the standards of *Milliken v. Bradley*, 418 U.S. 717 (1974). Also, the District Court held that petitioners were unitary, independent and autonomous school districts. Significantly, the District Court explicitly found that petitioners' nonresident student admission policies (which limit admission to resident students and a few racially-neutral exceptions for nonresidents) did not discriminate on the basis of race. In addition, the District Court found that petitioners' boundaries had not been gerrymandered. Consequently, the District Court decided that it could not

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School District of Kansas City, Missouri v. Missouri, 460 F. Supp. 421 (W.D. Mo. 1978). The ten Missouri districts besides petitioners and the five Kansas districts were not named as defendants in this case.

Unlike other interdistrict cases, petitioners have far fewer resources per pupil than the city district, KCMSD. The stereotypical suburban districts—wealthy and predominantly white as the result of white flight—are located across the state boundary in Kansas. Petitioners are school districts comprised largely of middle class families that have, respondents conceded, reputations for treating minorities fairly. Joint Appendix filed with Eighth Circuit ("J.A.") at 1738-39. That, respondents admit, was one reason they targeted petitioners as defendants in this action. *Id.* Thus, if not reversed, one of this case's many ironies will be that school districts with a reputation for fair treatment of minorities will be singled out for coerced participation in affirmative action plans.

order petitioners to participate in an interdistrict remedy of any kind.[4]

The District Court then turned to the intradistrict allegations. It held that both KCMSD—an admitted constitutional violator—and the State of Missouri had failed their affirmative duty under *Brown v. Board of Educ.*, 349 U.S. 294 (1955). *See generally Jenkins*, 593 F. Supp. 1485 (W.D. Mo. 1984). The District Court then issued a sweeping and unprecedented remedial order to correct those intradistrict violations.[5] *Jenkins*, 639 F. Supp. 19 (W.D. Mo.

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[4] *See generally Jenkins v. Missouri*, No. 77-0420-CV-W-4, General Memorandum and Order at 9, 11, 18-19, 64, 71, 81 (W.D. Mo. June 5, 1984) (order dismissing petitioners pursuant to Fed. R. Civ. P. 41(b)), *aff'd*, 807 F.2d 657. *See also Jenkins*, 639 F. Supp. 19, 38 (W.D. Mo. 1985) ("[B]ecause of restrictions on this Court's remedial powers in restructuring the operations of local and state government entities, any *mandatory* plan which would go beyond the boundary lines of KCMSD goes far beyond the nature and extent of the constitutional violations this Court found existed.") (emphasis in original).

[5] The cost of just two components of this intradistrict remedy—capital improvements and magnet schools—were estimated at $460,000,000. 110 S. Ct. at 1668 (1990) (Kennedy, J., dissenting). Those expenditures established programs in KCMSD's magnet schools which are far more extensive than programs offered by petitioners. Thus, another irony is that the panel's opinion will draw black students—the very students KCMSD's unprecedented intradistrict remedy was designed to help—away from KCMSD.

The extensive transfers dictated by the panel no doubt surprised even respondents' counsel. Prior to the panel's opinion, he admitted that he sought a transfer plan of short duration only, because "once all of the KCMSD middle and high schools have been converted to magnet [schools] parents and KCMSD will have a full range of educational options for their students." J.A. at 1128.

1985). One aspect of that intradistrict remedial order is at the heart of this petition. That component outlined a "Voluntary Interdistrict Transfer Program." *Id.* at 38-39. Under it, black (but not white) students residing in KCMSD could transfer to outlying school districts in the Kansas City area which volunteered to accept them, *"[i]f any* of [those school districts] volunteered to participate . . . ." *Id.* at 39 (emphasis supplied).

Though the District Court emphasized repeatedly it could not impose a mandatory interdistrict remedy on petitioners and that participation in the voluntary interdistrict transfer plan was truly voluntary, the judges on the Eighth Circuit participating in *Jenkins* began to coerce petitioners to "volunteer". This coercion was intended to serve, as the various opinions admit candidly, a social policy that those judges found desirable. Namely, they believed, petitioners' participation in the affirmative action transfer plan would "improv[e] the racial balance in the Kansas City area." *Jenkins,* 807 F.2d at 683 n.30.

In pursuit of that social policy, petitioners were threatened with the consequences they would face if they did not "volunteer."

> The district court is correct . . . such a program cannot be mandatorily imposed upon the record before the court. Whether a refusal of a district to participate in such a voluntary program may evidence discriminatory intent and thus be an independent basis for further relief and mandatory participation is an issue that we should not anticipate.

Id. (lead opinion). Judge Ross wrote separately to emphasize that the invitation to "volunteer" was an offer petitioners should not refuse.

> In my opinion, the failure to organize and implement the [voluntary interdistrict transfer]

> program would be a very significant factor in determining discriminatory intent in the future litigation which is certain to result from the further processing of this case.[6]

When petitioners (and all other districts which were parties in *Jenkins*) declined to join the specific "voluntary" interdistrict program envisioned by the courts, this case was filed against petitioners.

C. Proceedings In This Case. Respondents' complaint alleged that: (1) the "voluntary" interdistrict transfer plan allowed petitioners to volunteer for a program permitting black students from KCMSD to transfer to petitioners' districts; (2) petitioners had not yet volunteered; and (3) petitioners had committed a cross-district constitutional violation by not volunteering. Supplemental Appendix filed with Eighth Circuit ("S.A.") at 35-36.[7]

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[6] 807 F.2d at 687. Judge Ross never reconciled his holding that the court could not compel petitioners to participate in an interdistrict program with his statement that not participating in a "voluntary" interdistrict program would constitute a "failure".

[7] Respondents alleged also that petitioners had applied their respective nonresident student policies discriminatorily to prevent respondents from attending there. S.A. at 36. In particular, respondents claimed petitioners had admitted white nonresidents under those policies but invoked them to deny admission to respondents because they were black. *Id.* These policies had withstood judicial scrutiny in *Jenkins*. Indeed, in some instances the same students were at issue. Thus, collateral estoppel barred such claims.

Nonetheless, petitioners filed unrefuted affidavits in the District Court showing that they had: (a) admitted black and other minority nonresidents who qualified for admission under these policies, pp. 10-11d (black nonresident student admitted under petitioner's nonresident student policy); and (b) refused admission to white nonresidents who did not qualify for

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The District Court granted summary judgment and also found the case so lacking in merit that it awarded sanctions against respondents' counsel. It concluded that *Jenkins* collaterally estopped many of respondents' arguments and that *Jenkins* had given petitioners "the right to decide whether they wish to participate in a voluntary interdistrict transfer program. To rule otherwise would emasculate the meaning of the word 'voluntary.' " *See* p. 33d, *infra*. Given that *Jenkins* had held petitioners could volunteer for an interdistrict transfer plan but could not be forced to participate in one, the District Court concluded it was not possible to infer discriminatory intent from petitioners' nonparticipation. P. 34d, *infra*.[8]

The Eighth Circuit panel reversed. First, it reiterated the threats in *Jenkins*'s lead opinion and Judge Ross's concurrence. *See* pp. 6-7a, *infra*. Then, it noted:

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admission. J.A. at 413-14 (white nonresident students denied admission because they were nonresidents and did not comply with one petitioner's policy for admission as nonresidents). Based on those undisputed facts, the District Court granted summary judgment on this theory as well. P. 27d, *infra*.

[8] The uncontroverted facts not only failed to suggest discriminatory intent, the District Court concluded, but even refuted the possibility of such motives. Two petitioners had volunteered to participate in an interdistrict transfer plan under the right circumstances. Respondents did not agree to the circumstances outlined by petitioners and, though petitioners expressed a willingness to change their proposals, respondents offered no alternatives. Instead, they filed this action a few days before the start of the school year.

This petition assumes none of petitioners had volunteered, however, because that view of the facts is most favorable to respondents' theory.

> "[o]ne thing is clear from the record. Since [the] June 14, 1985 [order outlining the voluntary interdistrict transfer plan], not a single suburban school district [such as petitioners] has admitted a single black student from the KCMSD pursuant to a plan negotiated by the State and [petitioners] . . . Although we cannot say with certainty that the State and [petitioners] would never agree to a [voluntary interdistrict transfer] plan on their own, after five years, we believe that further delay cannot be countenanced. The time has come for the district court itself to formulate and implement a plan.

Id. at 9-10a. The panel reversed because it divined what the District Court could not find: a never-identified factual dispute "respecting [petitioners'] racial motivation in refusing to accept black transfer students from the KCMSD." *Id.* at 9a. Then, the panel actually went so far as to direct implementation of a specific interdistrict plan. Under the panel's plan, interdistrict transfers would begin in the 1990-91 school year—due to begin just five months later. As many as 1,500 black students (increasing to 6,000 students in later years) from KCMSD would transfer, the panel ordained, not only to petitioners' districts but to other outlying districts in the Kansas City area which were not even parties to this case.[9] Obviously, there was no evidence or record on the propriety of such a remedy for a wholly unproven violation.

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[9] P. 10-11b, *infra*. Though the panel deleted this provision in its substitute opinion, its inclusion in the original opinion reveals the social policy which drove the panel's consideration. Its dedication to coercing a large interdistrict transfer plan eclipsed its judicial duty.

Due to the extraordinary transformation of the action from one in which the District Court had entered summary judgment and awarded sanctions for a frivolous filing to "a massive, compulsory interdistrict transfer plan", p. 4c, *infra*, petitioners sought rehearing and suggested rehearing en banc. The Eighth Circuit denied both, but the panel withdrew its original opinion and issued a substitute opinion.[10]

Judge Bowman, who had not participated in *Jenkins*, and Judge Wollman dissented from the denial of rehearing en banc. Judge Bowman criticized the panel for trying "to bully litigants into submission not to the law but to the Court's will." P. 8c, *infra*. By issuing its coercive opinion, he wrote, "our court has made [petitioners] an offer they can't refuse: unless they start 'voluntarily' admitting transfers from [KCMSD], they will be adjudged to be violating the Equal Protection Clause, and then will be subject to the full remedial powers of the federal

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[10] When it withdrew the original opinion, the panel deleted some of the most blatant examples of its coercive action. For instance, the substitute opinion deleted the panel's creation of a remedy for a violation that had never been proven. *See* p. 11b, *infra* (identification of number of students to participate in "voluntary" transfers to begin in the next school year). Those deletions, an obvious attempt to limit the likelihood this Court would grant review, did not eliminate the coercive and legislative nature of the panel's opinion. The substitute opinion, Judge Bowman noted in his dissent from the denial of rehearing en banc, "is as flawed as its predecessor." P. 3-4c.

Though the original opinion is germane to this Court's consideration because it reveals the panel's legislative motives, this petition refers to the substitute opinion unless noted to the contrary.

courts." *Id.* at 5c. The panel opinion not only coerced petitioners, it insulted blacks as well. "[T]he idea that a good education for black students requires their submersion in a sea of white students strikes me as being patronizing and demeaning to blacks. As far as I know, it is unsupported by empirical evidence. I find it offensive." *Id.* at 6c. Judge Bowman's dissent acknowledged the social policy which motivated the panel's opinion—an interdistrict transfer plan designed to improve the "racial balance" in the Kansas City area. Judge Bowman agreed the panel might have been motivated by good intentions. Those "intentions, however, are not an adequate substitute for constitutional authority, which here is sorely lacking." *Id.* at 8c.

Finally, Judge Bowman warned: "This decision, if it is not overturned, will stand as a monument to the often tempting but always pernicious doctrine that arguably worthy ends justify illegitimate means." *Id.* at 5c. Judge Wollman joined Judge Bowman's dissent. *Id.* at 8c.

REASONS FOR GRANTING THE WRIT

I.

The unprecedented doctrine adopted by the Eighth Circuit Panel—that a unitary school district which did not cause segregation in another school district may violate the Fourteenth Amendment by declining to volunteer for an interdistrict affirmative action program—conflicts with this Court's decisions and those of other circuits.

Milliken v. Bradley established as black letter law that a federal court cannot order a school district to participate in a cross-district remedy without proof that:

> racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race . . . Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

418 U.S. 717, 745 (1974). The decision by the Eighth Circuit panel reduces *Milliken* to a point of etiquette and, in so doing, essentially eradicates it and the important policies it protects. Prior to the Eighth Circuit panel's ruling in this case, interdistrict cases in the 16 years since *Milliken* have followed a uniform approach. To comprehend the harm done by the panel's decision, one must consider the rule established unambiguously by *Milliken*'s holding.

In that case, the District Court found that governmental discrimination had caused segregation in the Detroit city school district. 418 U.S. at 725-28. The District Court then considered remedial options for this single-district violation, including a metropolitan-wide, interdistrict remedy. The District Court concluded that it could order a cross-district remedy for a violation confined to the city district. *Id.* at 730, 733. It eventually ordered just such a metropolitan remedy, and the Sixth Circuit affirmed. *Id.* at 735 (citing 484 F.2d 215, 245 (6th Cir. 1973)).

Applying the standard quoted earlier, this Court reversed. Its opinion emphasized that there was no proof

the outlying districts had committed interdistrict violations.[11] That precluded a federal court from ordering the outlying districts to participate in an interdistrict remedy.

In sharp contrast, the panel's decision in this case indicates that the District Court in *Milliken* erred only because it did not first ask the outlying districts in the Detroit area to volunteer before ordering them to participate in the interdistrict remedy. Indeed, petitioners' position is even stronger than the *Milliken* outlying districts because *Jenkins* vindicated them of having committed any interdistrict violation.[12]

Now, however, the panel wants to double back on both *Milliken* and *Jenkins* by holding that petitioners can be "ordered" to "volunteer" for the very type of interdistrict remedy that could not be imposed on them. *Milliken* did not intend to countenance such an "Alice-in-Wonderland" rule to govern the relationship between the federal judiciary and local governments.[13] If it had, every

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[11] 418 U.S. at 735-36 (Sixth Circuit affirmed "without any discussion of the claims that no constitutional violation by the outlying districts had been shown . . . .").

[12] *Jenkins* gave petitioners a clean bill of constitutional health, holding that they were unitary. *Jenkins*, No. 77-0420-CVW-4, General Memorandum and Order at 8-9 (W.D. Mo. June 5, 1984).

[13] Judge Bowman drives home that point forcefully in his dissent from the denial of rehearing en banc: "The case thus takes on an Alice-in-Wonderland quality. On one hand [petitioners], not having been found guilty of a constitutional violation (and therefore having been dismissed from the *Jenkins* case) cannot judicially be compelled to take part in an interdistrict remedy. On the other hand, our court has made them an offer they can't refuse . . . ." P. 5c, *infra*.

intradistrict violation would serve as a launching pad for a court-imposed interdistrict transfer plan. A court or some litigant would need only to invite nearby districts to "volunteer" to remedy intradistrict segregation in another district, even though the putative volunteers had no hand in causing the segregation. If that invitation were declined, the federal court would then merely order the nonviolating districts into that "remedy." *Milliken* does not permit federal courts to interfere with local governments on such a shallow basis.[14]

In fact, this Court discussed the very situation presented by the panel's holding. In *Milliken*'s lead opinion, the Court noted that unless the outlying districts had

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[14] Petitioners recognize that at least one circuit seems to hold that inaction supports an inference of discriminatory conduct. *See Diaz v. San Jose Unified School Dist.*, 733 F.2d 660, 667 n.7 (9th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1065 (1985). At least one other circuit has held, however, that inaction alone is not sufficient. *See Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324, 329 nn.6, 7 (4th Cir. 1984). This Court has not squarely addressed the question and thus, it is appropriate for this Court to resolve this important conflict among the circuits.

Even if this Court were to adopt *Diaz*'s view, however, application of that rule to these facts is an extremely troubling proposition. The inaction relied on by the Eighth Circuit panel was petitioners' decision not to volunteer for a court-devised and court-endorsed affirmative action program. A court which has authored and endorsed such a plan has an inherent interest in seeing it implemented and, as a result, an inherent temptation to abandon its judicial function for a legislative one. Consequently, the "inaction doctrine" in these circumstances represents a potentially pernicious, illogical and virtually limitless source of unintended power for the federal courts.

"arranged for white students residing in the Detroit [city] district to attend schools in [the outlying districts in] Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so." 418 U.S. at 746-47. Petitioners have not arranged for white students residing in KCMSD to attend school in their districts. Given that, petitioners were not obligated to arrange for black students in KCMSD to attend school in their districts.

Though the panel's wide-ranging doctrine undercuts *Milliken* most directly, it does not stop there. It also violates the principles of several other important decisions by this Court. In *Dayton Bd. of Educ. v. Brinkman*,[15] the Court decided that a school district could not violate the Fourteenth Amendment by rescinding an action it was never obligated to take. Whether recision of a school board's resolution violated the Fourteenth Amendment was "inextricably bound up with the question of whether the Board was under a constitutional duty" to enact the resolution in the first place. If not, the recision did not violate the amendment. 433 U.S. at 414. That principle and its next logical extension bear directly on the panel's holding here.

If the school board in *Dayton* had never enacted the rescinded resolution, whether that inaction would have violated the Constitution would depend entirely on whether the board was under a constitutional duty to enact the resolution in the first place. If it were not, then the board would not have violated the Constitution by

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[15] 433 U.S. 406 (1977).

declining to enact the resolution. For this case, that principle means that petitioners' decision not to participate in a court-designed, voluntary affirmative action plan was not a constitutional violation unless they were under a duty to participate in the first place. *Jenkins*, applying *Milliken*'s standard, decided that question. Petitioners owed no constitutional duty to participate in an interdistrict remedy of any kind. The panel's emasculation of this important principle of federalism should be reviewed on certiorari.[16]

Finally, the panel's doctrine conflicts also with the Fourth Circuit's decision in *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324 (4th Cir. 1984). In that case, the city school district had sought to merge with an outlying school district, but its overtures were spurned. The merger was rejected, the city district alleged, because it had a large proportion of black students. The outlying district argued the merger overtures had not been pursued because it—like petitioners—was a unitary district and thus owed no legal duty to merge with the city district. *Id.* On appeal, the Fourth Circuit rejected the city district's theory, holding

> An independent school district which has not caused segregation in a neighboring independent district has no duty to rectify a racial imbalance in the other district.

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[16] *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), reiterates *Dayton*'s principle. In *Crawford*, the Court held a state may rescind a provision requiring its courts to "do 'more' than the Fourteenth Amendment requires" without violating that amendment. *Id.* at 535.

* * *

> Other than not moving to prevent developments which it has not occasioned, the [outlying district's] Board has done nothing to produce segregation in [the city district].

745 F.2d at 328-29.[17]

Goldsboro's rule is in direct conflict with the sweeping doctrine embraced by the Eighth Circuit panel. The panel imposed an obligation, in effect, on all predominantly white school districts—whether they have discriminated on the basis of race or not—to volunteer for interdistrict affirmative action programs with any constitutional violator who seeks their participation. Indeed, the holdings of the two circuits could scarcely conflict more. *Compare* the language of the Eighth Circuit panel, pp. 6-7a, *infra* (failure to participate in an interdistrict program which "has great potential for improving the racial balance in the Kansas City area" will be a "very significant factor in determining discriminatory intent in the future . . . .") *with* the Fourth Circuit's language, 745 F.2d at 328 (school district has "no duty to rectify a racial imbalance in" other districts).[18]

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[17] The Fourth Circuit cited cases from other circuits as ones in agreement with this principle. 745 F.2d at 328 (citing *Bell v. Board of Educ., Akron Public Schools*, 683 F.2d 963, 968 (6th Cir. 1982); *Board of Educ. of Ind. School Dist. No. 53 v. Board of Educ. of Ind. School Dist. No. 52*, 413 F. Supp. 342, 349 (W.D. Okla. 1975), *aff'd*, 532 F.2d 730 (10th Cir.), *cert. denied*, 429 U.S. 894 (1976)). Thus, the decision of the Eighth Circuit panel conflicts with these decisions as well.

[18] Petitioners have been through one lengthy case already, *Jenkins*, to vindicate themselves of alleged constitutional

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II.

The Eighth Circuit panel departed so far from acceptable practice by using its judicial stature and power to coerce petitioners to "volunteer" for an interdistrict affirmative action program as to warrant this Court's immediate supervision, given the nationwide importance of the issues presented.

Until the panel's decision in this case, it was axiomatic that a federal court could invoke its judicial power only if a constitutional violation had occurred. Numerous cases recognize this, but *Swann v. Charlotte-Mecklenburg Bd. of Educ.* may say it best:

> School authorities . . . might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

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wrongdoing. That case lasted ten years and resulted in a massive trial record created by 2,100 exhibits and over 140 witnesses. *See* 807 F.2d at 661. The principles adopted by the Eighth Circuit panel depart from *Milliken, Dayton* and *Goldsboro* so explicitly that a more extensive record is unnecessary to illuminate that conflict. Further, respondents made no effort to develop additional evidence during the five months that this case was pending before the District Court entered summary judgment. They were given every document and iota of information they requested.

402 U.S. 1, 16 (1971). By failing to distinguish between an appropriate policy for a legislative body and the circumstances which warrant federal court intervention, the Eighth Circuit panel offended a basic but important constitutional principle and confiscated powers not granted to the federal judiciary by the Constitution. It is of cardinal importance that this Court review such extraordinary action on questions subject to widespread application by inferior courts.

The Eighth Circuit panel made its social preferences quite clear: it believes racial balance would be a good thing for the Kansas City area and petitioners had better do what they can to help achieve it. Whether petitioners agree with the panel is of no consequence. Petitioners, of course, abhor racial discrimination in any form. Nevertheless, the federal courts are simply not authorized to take action to create "racial balance." The Eighth Circuit's *Jenkins* opinion misapprehended its proper role by counselling petitioners that "[a] voluntary interdistrict program is one that has great potential for improving the racial balance in the Kansas City area. The experience in St. Louis with such a plan seems to have been favorable" and later coercing them to that end.[19]

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[19] 807 F.2d at 683 n.30 The basis for the observation about the purported success of the St. Louis plan is unknown. No evidentiary record on that issue was before the court. It conflicts with the view of many persons more familiar with the St. Louis experience than the Eighth Circuit. *See*, for example, *The Kansas City Times*, Aug. 10, 1988, at A-7, col. 6-7 (quoting board member of St. Louis city district as saying the St. Louis voluntary plan was a failure which ought to be abandoned;

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Against the *Jenkins* backdrop and the extensive "voluntary" plan prescribed by the panel's original opinion (again without any evidentiary record)[20], it is virtually impossible to conceive that petitioners received any hearing, much less a fair one, on a constitutional question of great importance. Namely, do petitioners have a constitutional duty to volunteer to help "improv[e] the racial balance in the Kansas City area"? *Id.* at 683 n.30. In a case of such compelling importance for issues of federalism, separation of powers and local education, the need for this Court's review is of great urgency.

The result-oriented and policy-driven nature of the panel's effort to coerce petitioners is reflected in its opinions. The lead opinion did not cite a single case on the merits of the issue presented.[21] Instead, it merely recounted the admonitions that: the Eighth Circuit wants

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"People say [the voluntary plan] improves race relations. I don't think you can show it's improved race relations in St. Louis. I think they've gotten worse. . . . ").

Petitioners do not know whether the board member is correct. That is not the point. The point is that the Eighth Circuit panel made assumptions and drew conclusions without an evidentiary record on an issue of national importance.

[20] *See* p. 10b-11b, *infra* (outlining interdistrict transfers for as many as 6,000 students even though the class of respondents consists of only 134 students and extending transfer plan to school districts besides petitioners).

[21] It cited two cases for background purposes. First, it cited *Jenkins* for its warnings to petitioners. *See* pp. 5-7a, *infra*. Second, it cited the St. Louis litigation as a "model" for the design of a voluntary transfer plan in this case. *See* p. 11a, *infra* (citing *Liddell v. Board of Educ.*, 567 F. Supp. 1037, 1055 (E.D. Mo. 1983); 873 F.2d 191, 193-94 (8th Cir. 1989)).

to create racial balance in the Kansas City area; a voluntary transfer plan will help accomplish that racial balance; the outlying school districts in the Kansas City area had better volunteer for that plan. The panel's opinion then closed the circle between those earlier warnings and what was ahead: "[A]fter five years [without any voluntary transfers], we believe that further delay cannot be countenanced. The time has come for the district court *itself* to formulate and *implement* a plan." P. 10a, *infra* (emphasis supplied).[22]

The coercive effect of the panel's opinion was not lost on Judges Bowman and Wollman. Their dissent from the denial of rehearing en banc framed the issue generated by the panel's departure from the judicial function.

> The question before us is whether a so-called voluntary transfer plan can be anything but compulsory when this Court already has signalled, in unmistakable terms, that [petitioners'] refusal to accept large numbers of transfers . . . will be a 'very significant factor in determining discriminatory intent . . . . '

P. 4c, *infra*. Their dissent also identified the unmistakable choice which petitioners, though they have never been found in violation of the Constitution, must make. "[O]ur

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[22] Despite the haunting similarity between the reversed procedures of the District Court in *Milliken* and the suggestions of the Eighth Circuit panel in this case, it is not entirely clear whether the panel intended for the District Court to give petitioners a trial on remand. Having issued clear pronouncements, however, the panel has virtually bound the District Court to arrive at a preconceived result. Once again, Judge Bowman's dissent on the rehearing petition recognizes this reality. P. 4c, *infra*.

Court has made [petitioners] an offer they can't refuse: unless they start 'voluntarily' admitting transfers from the Kansas City School District, they will be adjudged to be violating the Equal Protection Clause, and then will be subject to the full remedial powers of the federal courts." *Id.* at 5c.

As Judges Bowman and Wollman noted, "An interdistrict transfer plan might or might not be a good thing. That is not the issue. The issue is the constitutional allocation of power, and whether our Court has been faithful to it." *Id.* In the zeal to improve "racial balance" by coercing petitioners into an interdistrict affirmative action plan, the panel simply lost sight of the fundamental restraints on its judicial power. The panel thus tried "to bully" petitioners, *see* p. 8c, *infra*, into compliance with its view of social policy. Whether a federal court may use its power and stature in such a manner is a question of vital importance for this Court to review.[23]

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[23] The panel's deviation from established Eighth Circuit practice reveals its orientation to achieve a particular, predetermined result.

For instance, given the widespread public interest in cases of this type, the Eighth Circuit has heard every other interdistrict desegregation case it has considered en banc from the outset. *See Jenkins*, 807 F.2d 657 (en banc); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404 (8th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1186 (1986); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984); *Morrilton School Dist. No. 32 v. United States*, 606 F.2d 222 (8th Cir. 1979) (en banc); *United States v. Missouri*, 515 F.2d 1365 (8th Cir. 1975) (en banc). Prior to argument, petitioners moved to have this tradition followed in this case. For some unexplained and inexplicable reason, the Eighth Circuit never ruled on that motion.

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III.

The opinion of the Eighth Circuit panel coerces petitioners to violate the Fourteenth Amendment, as construed by this Court's affirmative action decisions, thereby raising fundamental questions about federalism and local control of education.

The "voluntary" interdistrict transfer plan urged on petitioners by the Eighth Circuit panel is actually a court-created affirmative action plan. If petitioners were to participate in it, they would treat black nonresident students more favorably than white nonresident students by admitting them while denying admission to similarly situated white nonresidents.[24] This Court's decisions in

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Similarly, the panel assigned to decide respondents' appeal was not selected by the normal method of random assignment. Instead, two judges who dissented in *Jenkins*—and who would have imposed a mandatory interdistrict remedy on petitioners at that time—were assigned to the panel. *See* 807 F.2d at 695. Both voted in this case to impose, in effect, the mandatory remedy that they could not achieve in *Jenkins*. Moreover, the author of the panel's opinion had written an article expressing his personal support for extensive court-ordered remedies. *See* Heaney, *Busing, Timetables, Goals and Ratios: Touchstones of Equal Opportunity*, 69 Minn. L. Rev. 735 (1985).

Lastly, the panel consolidated this case with the still pending remedial portions of *Jenkins*. *See* p. 12a, *infra*. They reached this result, without discussion, even though: (a) three judges in the District Court—including the one presiding over *Jenkins*—had considered consolidation and found it unnecessary; (b) the Eighth Circuit's own precedent permits reversal of a decision to consolidate only if a district court abuses its discretion. *Burlington Transp. Co. v. Josephson*, 153 F.2d 372, 378 (8th Cir. 1946).

[24] As a general rule, a school district in Missouri is not required to accept a student who does not reside in that

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affirmative action cases suggest that school districts in the position of petitioners may not discriminate in favor of black nonresidents and against white nonresidents. This is an issue of nationwide importance that transcends the field of public education and it should be addressed by this Court.

In *Wygant v. Jackson Bd. of Educ.*, this Court held that governmental entities distinguish "between citizens solely because of their ancestry" when they adopt racial affirmative action plans. 476 U.S. 267, 273 (1986) (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)). As a result, such plans are inherently suspect and require "exacting judicial examination." 476 U.S. at 273 (quoting *Regents of University of California v. Bakke*, 438 U.S. 265, 291 (1978)). This "exacting judicial examination", *Wygant* held, requires a two-part analysis: (1) Does a "compelling government interest" justify the affirmative action plan's discrimination on the basis of race? (2) Does the plan adopt "narrowly tailored" means to accomplish that interest? 476 U.S. at 274. *Wygant* considered both elements of this analysis, but its review of the first component is most relevant to this petition.

Wygant held that the effect of "societal discrimination" was an insufficiently compelling interest to justify a school district giving preference to minority teachers over nonminority teachers. 476 U.S. at 275-77.[25] Instead, the

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district. Since this interdistrict plan was outlined, white nonresidents have contacted petitioners seeking to enroll in light of the voluntary plan permitting black nonresidents to transfer.

[25] The Court held also that the need for black children to have black teachers as role models was insufficient to justify discrimination in the name of affirmative action. 476 U.S. at 276.

Court found that it had consistently "insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination." *Id.* at 274 (emphasis supplied). That requisite is missing here.

No showing has ever been made that petitioners have practiced the discrimination necessary to justify reverse-discrimination in the name of remedial action. Indeed, *Jenkins* concluded just the opposite. Petitioners, it held, were unitary and had not caused a segregative effect in their districts or KCMSD. *See generally Jenkins*, 807 F.2d 657.[26]

Later, in *City of Richmond v. J. A. Croson Co.*,[27] the Court dealt with this important issue again. That case

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[26] Importantly, *Wygant*'s principle found its origins in this Court's school desegregation decisions. The Fourteenth Amendment, *Wygant* observed, imposes two duties on public school districts. On one hand, they must eliminate all vestiges of racial segregation. 476 U.S. at 277 (citing *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46, 91 (1971)). On the other hand, they must observe a "'core purpose of the Fourteenth Amendment' which is to 'do away with all governmentally imposed discriminations based on race.'" *Id.* (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

Petitioners, *Jenkins* held explicitly, had discharged their duties on an intradistrict basis and had never run afoul of them on the interdistrict basis. Thus, though found to have done away with all forms of discrimination based on race, they are now coerced by the Eighth Circuit panel to practice racial discrimination by preferring black nonresident students over similarly situated nonresident white students. This is an issue of national concern in civil rights cases. Review by certiorari would resolve the proper role for federal courts in all contexts of affirmative action, not just in education.

[27] 109 S. Ct. 706 (1989).

considered whether a city could set aside for minorities a percentage of contracts in the construction industry without specifically identifying the discrimination purportedly justifying that as "remedial" action. 109 S. Ct. at 727. *Croson* suggests in terms more definite than *Wygant*, but not yet explicit, that a local governmental entity may not rely on the discriminatory actions of the state to justify an affirmative action plan: "[T]he states and their subdivisions may take remedial action when they possess evidence that their *own* spending practices are exacerbating a pattern of prior discrimination . . . . " *Id.* at 727 (emphasis supplied). More important yet—because it relies on *Milliken*—was *Croson*'s view that "[w]e have never approved the extrapolation of discrimination in one jurisdiction from the experience of another." *Id.* (citing *Milliken*, 418 U.S. at 746).

In sum, petitioners have been coerced to join an affirmative action program even though *Milliken* and *Swann* hold that the federal courts lack authority to pursue that result and even though *Wygant* and *Croson* may forbid their participation. By so coercing, the Eighth Circuit panel intruded, without constitutional justification, on the important role of local governments in a federalist system. This Court has recognized consistently the fundamental role which local governments play in our country's system of education. As *Milliken* put it:

> No single tradition in public education is more deeply rooted than local control over operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. Thus, we [have] observed that local control

> over the educational process affords citizens an opportunity to participate in decision-making [and] permits the structuring of school programs to fit local needs . . . .

418 U.S. at 741-42 (citations omitted).

The Eighth Circuit panel has devalued that national tradition, using sheer force to impose its values on petitioners in place of those selected by petitioners' patrons. Use of federal judicial power in such circumstances encroaches needlessly on *Milliken* and, as a result, on the public values it protects. Without this Court's immediate review, the panel's unwarranted intrusion into public education will eradicate *Milliken* and, ultimately, the values it was intended to protect.

CONCLUSION

For these reasons, petitioners request respectfully that the Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A
(SUBSTITUTE OPINION ISSUED MAY 23, 1990)
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1957

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend Rosemary Jacobs Love; Kirk Allen Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellants,

American Federation of Teachers, Local 691,

Appellee,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri;

Appeals from the United States District Court for the Western District of Missouri.

Missouri State Board of Education; Roseann Bentley, Dan Blackwell, Terry A. Bond, President, Roger L. Tolliver, Raymond McCallister, Jr., Susan D. Finke, Thomas R. Davis, Cynthia B. Thompson, Members of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellees,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellees.

No. 89-2452

Jennifer T. Naylor and Eric J. Naylor, by their next friend Reverend James Naylor; Dwayne Shores, by his mother and next friend Rose Shores; Adrian R. Dean, Tanisha M. Johnson, Andrea L. Johnson, and Gregory T. Johnson, by their mother and next friend Patience M. Johnson; Kevin Dion Innis, by his mother and next friend Linda Innis; Deidra Jovan Rayfield, by her mother and next friend Latricia Rayfield McArn; Nicole R. Griffith, by her father and next friend Raymond B. Griffith, Sr.; Chrissean King, by his mother and next friend Patti King;

Ronale M. Dunn, by his mother and next friend Janice Dunn; LaShonda M. Gross, by her father and next friend Michael L. Gross; Jerry Steve Roggett, by his grandmother and next friend, Martha M. Anderson; and Bryant Tucker, by his mother and next friend Gladys Tucker,

Appellants,

Arthur A. Benson, II,

Appellant,

v.

Lee's Summit Reorganized School District R-7; Dr. Gail Williams, Acting Superintendent thereof; and Robert Jones, Robert Bruce, James Coleman, John Patterson, Margaret Piepergerdes, Sherry Sims, Members of the Board of Education thereof; North Kansas City, Missouri School District; Dr. Gene Denisar, Superintendent thereof; and Freddie Nichols, Rick Moore, Sandra Clark, Mary Smith, Bill Trickey, Joe Jacobs, Wes McCullough, Members of the Board of Education thereof; School District of the City of Independence; Dr. Robert Henley, Superintendent thereof; and Sharon Williams, Helen French, Michael Barnett, Ronald Sinke, Sharon Floyd, Phillip Parrino, Members of the Board of Education thereof; The State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer

of the State of Missouri; Robert Bartman, Commissioner of Education of the State of Missouri; and Roseann Bentley, Dan Blackwell, Pres. Terry A. Bond, Delmar A. Cobble, Grover Gamm, Jimmy Robertson, Robert L. Welling, Donald E. West, Members of the Missouri State Board of Education,

Appellees.

Submitted: February 21, 1990
Filed: May 23, 1990

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HEANEY, Senior Circuit Judge.

We are concerned in these consolidated appeals with the following questions: (1) did the district court err in granting summary judgment to the North Kansas City School District, Lee's Summit Reorganized School District R-7, and the Independence School District; (2) did the district court err in granting summary judgment to the State of Missouri; and (3) did the district court err in imposing sanctions of $83,761.59 on appellants' attorney, Arthur A. Benson II. We answer all three questions in the affirmative and remand to the district court with directions that it promulgate a voluntary interdistrict transfer

plan. This plan will require the State of Missouri to pay transportation and tuition costs for a limited number of black students residing in the Kansas City, Missouri School District who desire to attend suburban schools and who are accepted pursuant to the plan.

BACKGROUND

On June 14, 1985, Judge Russell Clark entered an order desegregating the Kansas City, Missouri School District (KCMSD). *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied sub nom. Kansas City, Missouri School Dist. v. Missouri*, 108 S. Ct. 70 (1987). An integral provision of the order required the State of Missouri to actively seek the cooperation of each suburban school district in the Kansas City area in a voluntary interdistrict transfer (VIT) program. The order required the State to pay for the transportation and tuition of black students who transfer from a school within the KCMSD in which their race is in the majority, with preference to students from schools with 90% or more black students, to a suburban school where space is available and in which their race is in the minority. The order required that the State continue to pay the KCMSD the full student foundation allotment for each student who transfers from that district to a suburban school. *Id.* at 39.

The order provided that a receiving district must: (1) agree not to reject individual applicants unless there is a history of serious discipline problems; (2) allow the transfer students to remain in attendance until such student graduates or returns to the student's home district as

long as that student satisfies all academic and other standards applicable to resident students; (3) treat transfer students in the same manner as it treats resident students; and (4) permit the KCMSD to recruit within its district applicants for interdistrict transfers. The order also required the State of Missouri to provide a full-time counselor for every 100 students who transfer from the KCMSD to a suburban school district. *Id.*

This order providing for VITs, a component of the district court's comprehensive desegregation plan, was appealed to this Court. On December 5, 1986, we affirmed. *Jenkins v. Missouri*, 807 F.2d 657, 686 (8th Cir. 1986), *cert. denied sub nom. Kansas City, Missouri School Dist. v. Missouri*, 108 S. Ct. 70 (1987). We held that while the facts did not justify a compulsory interdistrict remedy, the interdistrict transfer plan ordered by the district court was constitutionally justified.[1]

In footnote 30 of that opinion, we stated:

> A voluntary interdistrict program is one that has great potential for improving the racial balance in the Kansas City area. The experience in St. Louis with such a plan seems to have been favorable. The district court is correct in its holding that such a program cannot be mandatorily imposed upon the record before the court. Whether a refusal of a district to participate in such a voluntary program may evidence discriminatory intent and thus be an independent

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[1] This Court's opinion modified the district court's requirement that the State pay the KCMSD the full student foundation allotment for each student transferring out of the district and authorized the formation of a citizens committee to monitor the interdistrict transfer plan. 807 F.2d at 684.

> basis for further relief and mandatory participation is an issue that we should not anticipate.

Id. at 683 n.30. Judge Ross wrote separately to emphasize the importance of this admonition. He stated:

> At the time of argument it was my understanding that a voluntary interdistrict program, patterned along the lines of the St. Louis program was a real possibility. It would now appear that some of the districts are not moving forward with this plan.
>
> In my opinion the failure to organize and implement this program would be a very significant factor in determining discriminatory intent in the future litigation which is certain to result from the further processing of this case. The St. Louis program would be a useful model for the actions to be taken by all the Missouri districts which are parties to this action.

Id. at 687 (Ross, J., concurring).[2]

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[2] Judges Lay, Heaney, and McMillian would have ordered compulsory interdistrict relief. *Id.* at 712 (Lay, C.J., dissenting). Judge Arnold dissented from that part of the Court's order which held that the suburban school districts could not be required to participate in an interdistrict remedy for interdistrict school segregation caused by the State's unconstitutional housing segregation. *Id.* at 687 (Arnold, J., concurring in part and dissenting in part).

In late 1987, the Jenkins plaintiffs charged that the State of Missouri was not seriously committed to seeking the cooperation of the suburban school districts in a voluntary interdistrict program and requested the court to direct the state defendants to engage in further efforts and activities towards achieving such a program. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 14 (W.D. Mo. Jan. 7, 1988). The court acknowledged that

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I. Claims of Naylor Plaintiffs

In the summer of 1988, 134 black students applied for admission into three suburban school districts, North Kansas City, Lee's Summit, and Independence. They were denied admission. Arthur Benson, acting as counsel for the students who had been rejected, commenced an action asserting that these students had been denied admission because of their race and asking the court to order the school districts to admit them, and to order the State to pay their transportation and tuition costs. The case was initially assigned to Judge D. Brook Bartlett of the Western District of Missouri. Benson made application to transfer the case to Judge Russell Clark, who retained responsibility for the *Jenkins* case. That motion was denied. After Judge Bartlett recused himself, the case was reassigned to Judge Joseph E. Stevens, Jr. Benson made a second motion for transfer, which was also denied. On January 11, 1989, Judge Stevens granted summary judgment in favor of the State and the three school districts.

Judge Stevens reasoned that the conditions which the suburban school districts set forth in denying the black students' transfer applications were prospective only, and

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progress in achieving a voluntary interdistrict program had been slow, but denied plaintiffs' motion, stating that the newly-created subcommittee of the Desegregation Monitoring Committee was fully committed to assisting the state and the other parties in developing a program and that the subcommittee was the most effective means of achieving a successful interdistrict transfer program. *Id.*

were suggested components of voluntary interdistrict transfer plans that had not yet been finalized or approved. He held that the black students were denied admission for the 1988-89 school year only because they failed to meet the suburban districts' existing requirements for nonresident transfers. Consequently, Judge Stevens concluded that the black students' challenge to the proposed conditions for voluntary interdistrict transfers was not yet ripe.

Judge Stevens finally concluded that because none of the black students had been admitted to the suburban districts for the 1988-89 school year, the State had not violated its obligation under the June 14, 1985 order by refusing to pay their tuition and transportation costs. Plaintiffs appeal from the district court's entry of summary judgment.[3] We reverse because a material factual dispute remains respecting the suburban school districts' racial motivation in refusing to accept black transfer students from the KCMSD.

While the record is replete with allegations, affidavits, counter-affidavits, and letters between the parties bearing on the question whether the suburban school districts' refusal to accept the black students was racially motivated, one thing is clear from the record. Since June

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[3] We have consolidated this appeal with that in *Jenkins v. Missouri*, No. 89-1957. The Jenkins class appeals Judge Clark's denial of its motion to compel the State of Missouri to fund VIT expenses for the 1988-89 school year. Judge Clark denied the motion as moot because the suburban school districts admitted no KCMSD transfer students for the 1988-89 school year.

14, 1985, not a single suburban school district has admitted a single black student from the KCMSD pursuant to a plan negotiated by the State and the suburban school districts. While there may be many reasons contributing to this failure, it seems clear to us that a very important one is the State's refusal to pay transportation costs and tuition for students until a VIT plan has been negotiated with the suburban districts and approved by the district court. Meanwhile, no suburban district is willing to accept any transfer student until it is assured that it will receive State funding. Although we cannot say with certainty that the State and the suburban school districts would never agree to a VIT plan on their own, after five years, we believe that further delay cannot be countenanced. The time has come for the district court itself to formulate and implement a plan. We therefore remand to the district court with directions to reassign the *Naylor* case to Judge Russell Clark, the judge currently responsible for the *Jenkins* litigation.

In No. 89-1957, *Jenkins v. Missouri*, the plaintiff class appeals from the district court's determination that the question of funding voluntary interdistrict transfers was not ripe. We disagree with this decision and believe that it should be vacated, and the case remanded for further proceedings consistent with this opinion.

Resolution of the issues presented in *Jenkins v. Missouri* requires that the district court, after giving the parties an opportunity to suggest proposals, promptly develop a voluntary interdistrict transfer program to implement the remedy called for in its opinion of July 14, 1985, which we affirmed. *Jenkins*, 807 F.2d at 682-84, 712. The essentials of the plan should be generally consistent

with those originally set forth in the opinion of June 14, 1985, as modified and affirmed by this Court. Additionally, the district court may find guidance in development of such a plan in the several decisions of this Court in *Liddell v. Missouri*, 731 F.2d 1294, 1302 (8th Cir.) (en banc), *cert. denied*, 462 F.2d 816 (1984); *see also Liddell v. Board of Education*, 567 F. Supp. 1037, 1055 (E.D. Mo. 1983); *Liddell v. Board of Education*, 873 F.2d 191, 193-94 (8th Cir. 1989). It is to be hoped that the district court can develop a program so that school districts which desire to do so may participate in the 1990-91 school year.[4]

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[4] The State of Missouri resisted the Naylor and Jenkins plaintiffs' requests that the district court order the State to fund voluntary interdistrict transfers because no VIT plan had yet been approved by the district court. The State also contended that it had no obligation to fund the plaintiffs' proposed transfers because Judge Clark's original order directed the State, rather than the plaintiffs, to implement a VIT plan. Judge Clark rejected the latter contention, noting that:

> there is nothing in the prior orders preventing the other parties from seeking the cooperation of other school districts in a VIT program. This is evidenced by the Court's statement that 'the newly created voluntary interdistrict transfer subcommittee of the Desegregation Monitoring Committee is fully committed to assisting the State *and the other parties* in developing a voluntary interdistrict transfer program.'

Jenkins, No. 77-0420-CV-W-4 (W.D. Mo. Nov. 29, 1988), Order at 5 (quoting Jan. 7, 1988 Order at 14) (emphasis added to original).

Judge Clark's opinion of June 14, 1985 also admonished:

(Continued on following page)

Any statements submitted to the district court by the plaintiffs, the *Jenkins* class, the State, the suburban school districts, or others as to the contents of the voluntary interdistrict transfer program may not be used as evidence of racial animus in any future proceedings.

For reasons already given in this opinion, we are also remanding for further proceedings before Judge Clark, the *Naylor* case, in which we have held a genuine issue of material fact exists as to the racial motivation of appellees' refusal to accept black transfer students from

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(Continued from previous page)

> [T]he State of Missouri must demonstrate that they are seriously committed to seeking the cooperation of each suburban school district in the Kansas City, Missouri metropolitan area. If the State does not demonstrate its commitment, then this Court will seek other methods of accomplishing this task at the State's expense.

Jenkins, 639 F. Supp. at 51.

Additionally, Judge Clark has several times underscored the need for the district court to maintain control of and to finally approve any VIT plan that is to be implemented. *E.g.*, *Jenkins*, No. 77-0420-CV-W-4 (W.D. Mo. Feb. 16, 1989), Order at 3; *Jenkins*, No. 77-0420-CV-W-4 (W.D. Mo. May 5, 1989), Order at 2.

Despite Judge Clark's initial instruction to the State to propose a VIT plan in 1985, nearly five years have passed without the State demonstrating its willingness to propose such a plan. In view of the State's apparent reluctance to proceed, and because of the district court's repeated intention to retain final approval over any VIT proposal, we believe that the time has come for the district court itself to develop a VIT plan in order to implement the remedy called for in its June 14, 1985 opinion and approved by this Court.

KCMSD. The district court should consider whether this litigation should be stayed pending the formulation of the voluntary interdistrict transfer program, and a decision by the suburban school districts as to whether to participate in it. This decision we leave to the district court's discretion.

In *Naylor*, the summary judgment for the defendants is reversed, and the cause is remanded for further proceedings consistent with this opinion. In *Jenkins*, the decision of the district court denying the motion of the *Jenkins* class for implementation of the voluntary interdistrict plan is likewise reversed, and the cause remanded for further proceedings consistent with this opinion.

II. Sanctions

Judge Stevens imposed sanctions of $83,761.59 on Benson, appellants' attorney, after entering summary judgment in favor of all defendants. Judge Stevens sanctioned Benson because plaintiffs' claim that the suburban school districts treated black transfer applicants differently from white transfer applicants was frivolous, because Benson withdrew a motion for a preliminary injunction after asserting that plaintiffs would be satisfied only with immediate relief, and because Benson filed a second motion to transfer the case to Judge Clark after his first such motion had been denied.

We apply a three-pronged review to a district court's award of Rule 11 sanctions. *E.E.O.C. v. Milavetz & Assocs., P.A.*, 863 F.2d 613, 614 (8th Cir. 1988). Factual findings supporting the sanctions are reversed only if clearly erroneous, the legal conclusion that Rule 11 has been violated

is reviewed de novo, and the appropriateness of the sanction is reviewed for abuse of discretion. *Id.*

Judge Stevens found frivolous that portion of plaintiffs' complaint alleging that the suburban school districts treated black transfer applicants differently from their white counterparts.[5] In our view, this allegation is not so frivolous as to warrant Rule 11 sanctions. Plaintiffs presented letters written by the school districts to parents of the unsuccessful transfer applicants containing proposed conditions for transfers clearly tied to the ongoing Kansas City school desegregation litigation. These conditions could not be applied to white transfer applicants who were not parties to the desegregation litigation. Additionally, we do not believe plaintiffs' complaint is as easily divided into two separate claims, one frivolous and one not, as Judge Stevens concluded it was.

The plaintiffs' allegations arose out of a single set of facts, the suburban school districts' denial of their transfer applications. Plaintiffs filed their suit in August 1988, shortly after their applications were denied, and sought relief to take effect for the 1988-89 school year. In view of the limited time in which Benson had to act, we believe that the complaint he filed on plaintiffs' behalf was, to the best of his knowledge after a reasonable investigation, well grounded in fact and warranted by a good faith

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[5] Judge Stevens originally found the entire claim to be sanctionable. On reconsideration, however, the court concluded that plaintiffs' allegation of discriminatory intent was prompted by this Court's decision in *Jenkins v. Missouri*, 807 F.2d at 683 n.30. Accordingly, Judge Stevens ordered Benson to pay half the defendants' attorney's fees.

argument for the extension or modification of existing law. *See* Fed. R. Civ. P. 11; *see also id.* advisory committee note (what constitutes a reasonable inquiry may depend on the amount of time for investigation available to the signer).

Judge Stevens also based the sanction award on Benson's second motion to transfer the case to Judge Clark. In our view, the Naylor plaintiffs' claims are inextricably involved with the *Jenkins* litigation and this case should have been assigned to Judge Clark in the first place. We believe Benson's motions to transfer were not intended to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation, but were instead intended to place identical issues before a single decision maker. Accordingly, we vacate the order of the district court imposing sanctions on Benson.

CONCLUSION

In conclusion, we repeat what we have said before. The interests of the students of the KCMSD and the suburban districts will be well served if all the parties see fit to participate in the VIT plan to be promulgated by the district court.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the court's opinion and write separately only to explain more completely my reasons for concluding that the rulings of the district court should be reversed.

This case demonstrates the difficulty of determining complex cases involving school desegregation, and the

attendant issues of discriminatory intent, by summary judgment. Text writers have discussed the inapplicability of summary judgment in such cases.[6] This is just such a case involving the question whether there was discriminatory intent on the part of three suburban school

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[6] Professors Wright, Miller, and Kane have stated that:

> Cases premised on alleged violations of the constitutional or civil rights of plaintiffs frequently are unsuitable for summary judgment. As is true with cases involving important public issues, courts may refuse to grant summary judgment in these actions because it is felt that a fuller record is necessary in order to be able to decide properly the issues involved. Further, the very nature of the claims involved often presents factual issues that require summary judgment to be denied.
>
> In many constitutional and civil rights cases, a necessary element of the claim for relief presents an inquiry into the state of mind of one or more of the parties. . . . [C]laims requiring a determination regarding intentions or motives are particularly unsuitable for summary adjudication. . . .
>
> Finally, in actions charging various forms of discrimination, in violation of the constitution or some statute, material fact issues may exist concerning whether the defendant intended or knowingly discriminated, thereby precluding summary judgment. Thus, for example, in cases alleging sexual or racial discrimination in employment or housing, an examination of motive and intent usually is involved, making the granting of summary judgment especially questionable.

10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2732.2, at 340-51 (2d ed. 1983) (footnotes omitted).

districts, which necessarily involves an analysis of the actions, practices, decisions, and policies of school boards and of those delegated to assist the boards in carrying out their responsibilities. This is not a case where a minimal record exists, since the record before the district court consisted of some 1,983 pages. Recent Supreme Court decisions amplifying the scope of summary judgment under Federal Rule of Civil Procedure 56 do not support the district court's grant of a summary judgment in this case. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), makes it plain that drawing legitimate inferences from the facts is a function for the fact-finder and:

> [t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Id. at 255 (citations omitted).

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), also underscores the necessity for genuine issues of material fact to defeat summary judgment. As *Matsushita* demonstrates, the substantive law in an area can limit the range of permissible inferences that can be drawn from a set of facts. *See id.* at 587-88.

The Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), made the following statements that must guide

this court in determining whether there is an issue for trial:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action – whether it "bears more heavily on one race than another," *Washington v. Davis*, [426 U.S. 229, 242 (1976)] – may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion [v. Lightfoot*, 364 U.S. 339 (1960)] or *Yick Wo* [*v. Hopkins*, 118 U.S. 356 (1886)], impact alone is not determinative, and the Court must look to other evidence.
>
> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

429 U.S. at 266-67 (citations and footnotes omitted).

As the court's opinion today points out, four years have passed, no plan has been adopted, and not one black student has been voluntarily transferred from KCMSD to

a suburban school district.[7] The record before the district court demonstrated that two of the districts, North Kansas City and Independence, had, over the last several years, declining enrollments which would indicate the availability of physical plant space. The record also reveals that in 1986 the Lee's Summit Schools had a 1.4 percent black enrollment and the Independence Schools had a 1.8 percent black enrollment, while the North Kansas City Schools' student body was: 1.7 percent black, 2.7 percent Hispanic, 1.2 percent Asian-Pacific, and .4 percent American Indian or Alaskan Native, for a total minority enrollment of 6 percent. (Jt. App. at 1163-65).[8]

The Naylor Class argues with some force that the district court's analysis unduly focused upon whether the suburban school districts' "nonresident policies had the foreseeable consequence" of preventing the plaintiff class from attending the suburban school districts based on their race, and failed to properly evaluate the practices of the suburban school districts in light of all the principles

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[7] Judge Ross' concurring opinion in *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) [hereinafter *Jenkins I*], expressed the opinion that failure to organize and implement a voluntary interdistrict program would be a significant factor in determining discriminatory intent in future litigation. *Id.* at 687 (Ross, J., concurring).

[8] While not in the record before the district court, publicly available enrollment figures demonstrate that black enrollment has continued to increase in four non-party suburban school districts, Center, Grandview, Hickman Mills, and Raytown, the districts that we recognized had made steady increases in black enrollment in *Jenkins I*, 807 F.2d at 664 n.9. Insofar as this may be material in this case, the district court on remand may make appropriate inquiry and findings.

underscored in *Arlington Heights*. I am also convinced that the district court erred in viewing the actions of the suburban school districts as merely preliminary proposals which could not serve as the basis for a finding of invidious discrimination. The entire situation before us simply demonstrates that the suburban school districts and the State have failed to make any headway toward the development of voluntary interdistrict transfer plans, and that each utilizes the inaction of the other as an excuse for its refusal to act.

I am satisfied that a review of both the policies and practices of the individual suburban school districts demonstrates that there is a genuine issue of material fact concerning the question of discriminatory intent.

When Naylor Class members requested admission to the Independence School District, the district responded by stating that the children would be admitted only if: (1) the State agreed to build and turn over to the district a new elementary school; (2) the district was reimbursed for its expenses in the prior *Jenkins* litigation and indemnified against the cost of future litigation arising out of the transfer program; and (3) the Jenkins Class attorneys agreed to not represent the children with respect to the district. These conditions were all set forth in a July 22, 1988, letter to Dr. Terry Stewart, Coordinator for Administrative Services, of the State Department of Elementary and Secondary Education. (Jt. App. at 1143-45). Moreover, while the Independence School District had an official non-resident student policy authorizing admission of four categories of students, (Jt. App. at 1083), the district referred to only one of those categories, namely non-resident students whose parents owned real estate in

Independence, in a letter to Dr. Stewart dated February 10, 1987, (Jt. App. at 1118-19). The evidence also disclosed that in the five school years between 1984 and 1989, the district had admitted 115 special education students, of whom 108 were white, three were black, and four were members of other minority groups. The district also admitted eight white students from the Drumm Farm, a residential institution for children. (Jt. App. at 1387). Those students were not within any of the categories described in the district's non-resident policy. The Naylor Class asks why the district strictly adhered to its non-resident policy to reject the black children while at the same time violating its policies in order to accept the predominantly white special education children. That question raises the issue of whether the Independence district has departed from normal procedures and created special conditions for the Naylor Class such as those referred to in *Arlington Heights*. I am satisfied that these are issues that preclude summary judgment.

Lee's Summit had maintained a policy allowing students not residing in Lee's Summit "to attend the district's schools upon payment of tuition as established by the Board." (Jt. App. at 1088). On July 27, 1988, the district wrote Dr. Stewart to inform the State of the district's decision to not accept the plaintiffs, because the State would not pay their tuition. (Jt. App. at 1151). When counsel for the Jenkins Class informed the district that the plaintiffs would fulfill reasonable tuition requirements that the district would determine, (Jt. App. at 1154-55), the district answered that the students were denied admission because they did not satisfy the district's admission policy and practice, which focused on

residency and property ownerships. (Jt. App. at 991). Later, an affidavit from the former board president stated that the district's policy was to accept non-resident students only to the extent required by law or to allow students to continue where the family had moved out of the district. Again, the district's shifting rationale and its failure to follow its own expressed policy both implicate the principles in *Arlington Heights* and could create an inference of discriminatory motive.

The North Kansas City School District had a policy allowing the enrollment of non-residents in several specified categories.[9] When the request was made for transfer by members of the Naylor Class, the district wrote to the State and to the parents of the black children stating that the children would be admitted only if: the district retained sole and final authority to accept or reject applicants; the students' parents or guardians pledged to support the students' educational activities and to be immediately available for consultation with school officials; certain school districts in the State of Kansas also agreed to accept KCMSD students; the State, KCMSD, and the plaintiff class provided full and unqualified indemnity to the district; KCMSD and the plaintiff class agreed to not pursue future litigation against the district; the district was fully reimbursed for all of the district's

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[9] These included children enrolled in special education programs, children whose families had moved from the North Kansas City School District, orphaned children, children whose legal residence was found to exist in the district by a court, foreign and domestic exchange students, and children of a non-resident person paying a school tax in the district. (Jt. App. at 1115-17).

fees, expenses, and costs from both the previous *Jenkins* litigation and its investigation of voluntary programs; and a set aside fund was placed under the district's control for a five-year period to partially insure the required indemnities. (Jt. App. at 1130-38). I am convinced that these conditions, particularly the reimbursement of the earlier *Jenkins* litigation expenses, could raise an inference of discriminatory intent, because they are imposed against only one group of transfer students: the group of black students seeking admission.

As part of the response to the motion for summary judgment, the class filed affidavits from two Professors of Sociology, Dr. Robert L. Crane of Columbia University's Teachers College, and Dr. Mary R. Jackman of the University of Michigan, both claiming to be knowledgeable in the area of racial attitudes. Both of them analyzed the letter from the North Kansas City School District and expressed opinions in detail that the letter demonstrated racially discriminatory intent. These opinions are further support for the conclusion that factual issues were presented.

The record also reveals that North Kansas City School District had accepted non-residents if it was able, and the student's home district was unable, to meet the applicant's educational needs and if tuition was paid by the home district. Those accepted were routinely white, coming from home districts that were nearly all white.

In view of our determination that we must remand the issues with respect to the three suburban school districts for further proceedings, and in view of our earlier orders requiring that the State take the lead in developing

voluntary interdistrict transfer plans, I believe that we need say no more concerning the need for remand as to the State.

A few further words are in order concerning the refusal to transfer this case to Judge Clark, who has presided over the *Jenkins* litigation. Evidently when filed, the *Naylor* case was assigned to a different division under the procedures of the clerk's office. Motions to transfer or consolidate were then denied. The order of the district court, however, in ruling on *Naylor*, made numerous references to Judge Clark's participation in *Jenkins*. In that order, the court questioned whether the eleven criteria of the North Kansas City School District's letter would qualify as an appropriate voluntary transfer plan under Judge Clark's order in *Jenkins*. *Naylor v. Lee's Summit Reorg. School Dist. R-7*, 703 F. Supp. 803, 816 n.17 (W.D. Mo. 1989).[10] In considering the liability of the State, the district court referred to Judge Clark's order and held that it did not have jurisdiction to decide whether the State had a duty to fund a voluntary interdistrict plan, as these requirements stem from Judge Clark's remedial order, and it was for him to make this determination. *Id.* at 818. The court also acknowledged Judge Clark's role in formulating a voluntary plan as well as the right of the State to challenge its responsibility to finance tuition and transportation of students in such a plan, which it could not

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[10] The district court stated that several of the conditions in the North Kansas City School District's proposal were perhaps in violation of the equal protection clause, and questioned whether they would pass constitutional muster standing on their own, but further concluded that the issue was not before it. *Id.* at 816.

find to be evidence of discrimination against plaintiffs in the case before it. These references to the *Jenkins* litigation pending before Judge Clark and to the need for action by him in that case point to the interrelationship of the *Naylor* case with *Jenkins* and the desirability of determining all of the voluntary transfer issues in one court, that responsible for the *Jenkins* litigation.

Interestingly, the district court in *Naylor* pointed to the prematurity of the issues because the North Kansas City School District's proposal was not yet a final plan. That proposal was predicated upon the State's willingness to pay tuition for the transfer students. Lee's Summit refused to accept transfer students because of the State's refusal to pay tuition. The State argued successfully before Judge Clark that whether the State had to fund voluntary transfer plans was a moot question, because no plans existed. These circular rationalizations, with the suburban school districts refusing to adopt a plan because the State has not made funds available, and the State arguing that there is no voluntary plan for it to fund, make the remand to fashion a voluntary plan essential. It also underscores the desirability of a stay of further litigation in *Naylor.*

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B
(WITHDRAWN OPINION ISSUED APRIL 2, 1990)
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1957

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend Rosemary Jacobs Love; Kirk Allen Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;	*	Appeals from the United States District Court for the Western District of Missouri.
Appellants,	*	
American Federation of Teachers, Local 691,	*	
Appellee,	*	
v.	*	
The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri;	*	

Missouri State Board of Education; Roseann Bentley, Dan Blackwell, Terry A. Bond, President, Roger L. Tolliver, Raymond McCallister, Jr., Susan D. Finke, Thomas R. Davis, Cynthia B. Thompson, Members of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellees,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellees.

No. 89-2452

Jennifer T. Naylor and Eric J. Naylor, by their next friend Reverend James Naylor; Dwayne Shores, by his mother and next friend Rose Shores; Adrian R. Dean, Tanisha M. Johnson, Andrea L. Johnson, and Gregory T. Johnson, by their mother and next friend Patience M. Johnson; Kevin Dion Innis, by his mother and next friend Linda Innis; Deidra Jovan Rayfield, by her mother and next friend Latricia Rayfield McArn; Nicole R. Griffith, by her father and next friend Raymond B. Griffith, Sr.; Chrissean King, by his mother and next friend Patti King;

Ronale M. Dunn, by his mother and next friend Janice Dunn; LaShonda M. Gross, by her father and next friend Michael L. Gross; Jerry Steve Roggett, by his grandmother and next friend, Martha M. Anderson; and Bryant Tucker, by his mother and next friend Gladys Tucker,

Appellants,

Arthur A. Benson, II,

Appellant,

v.

Lee's Summit Reorganized School District R-7; Dr. Gail Williams, Acting Superintendent thereof; and Robert Jones, Robert Bruce, James Coleman, John Patterson, Margaret Piepergerdes, Sherry Sims, Members of the Board of Education thereof; North Kansas City, Missouri School District; Dr. Gene Denisar, Superintendent thereof; and Freddie Nichols, Rick Moore, Sandra Clark, Mary Smith, Bill Trickey, Joe Jacobs, Wes McCullough, Members of the Board of Education thereof; School District of the City of Independence; Dr. Robert Henley, Superintendent thereof; and Sharon Williams, Helen French, Michael Barnett, Ronald Sinke, Sharon Floyd, Phillip Parrino, Members of the Board of Education thereof; The State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer

of the State of Missouri; Robert Bartman, Commissioner of Education of the State of Missouri; and Roseann Bentley, Dan Blackwell, Pres. Terry A. Bond, Delmar A. Cobble, Grover Gamm, Jimmy Robertson, Robert L. Welling, Donald E. West, Members of the Missouri State Board of Education,

Appellees.

Submitted: February 21, 1990

Filed: April 2, 1990

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HEANEY, Senior Circuit Judge.

We are concerned in these consolidated appeals with the following questions: (1) did the district court err in granting summary judgment to the North Kansas City School District, Lee's Summit Reorganized School District R-7, and the Independence School District; (2) did the district court err in granting summary judgment to the State of Missouri; and (3) did the district court err in imposing sanctions of $83,761.59 on appellants' attorney, Arthur A. Benson II. We answer all three questions in the affirmative and remand to the district court with directions to it to promulgate a voluntary interdistrict transfer plan. This plan will require the State of Missouri to pay

transportation and tuition costs for a limited number of black students residing in the Kansas City, Missouri School District who desire to attend suburban schools and who are accepted pursuant to the plan.

BACKGROUND

On June 14, 1985, Judge Russell Clark entered an order desegregating the Kansas City, Missouri School District (KCMSD). *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied sub nom. Kansas City, Missouri School Dist. v. Missouri*, 108 S. Ct. 70 (1987). An integral provision of the order required the State of Missouri to actively seek the cooperation of each suburban school district in the Kansas City area in a voluntary interdistrict transfer (VIT) program. The order required the State to pay for the transportation and tuition of black students who transfer from a school within the KCMSD in which their race is in the majority, with preference to students from schools with 90% or more black students, to a suburban school where space is available and in which their race is in the minority. The order required that the State continue to pay the KCMSD the full student foundation allotment for each student who transfers from that district to a suburban school. *Id.* at 39.

The order provided that a receiving district must: (1) agree not to reject individual applicants unless there is a history of serious discipline problems; (2) allow the transfer students to remain in attendance until such student graduates or returns to the student's home district as

long as that student satisfies all academic and other standards applicable to resident students; (3) treat transfer students in the same manner as it treats resident students; and (4) permit the KCMSD to recruit within its district applicants for interdistrict transfers. The order also required the State of Missouri to provide a full-time counselor for every 100 students who transfer from the KCMSD to a suburban school district. *Id.*

This order providing for VITs, a component of the district court's comprehensive desegregation plan, was appealed to this Court. On December 5, 1986, we affirmed. *Jenkins v. Missouri*, 807 F.2d 657, 686 (8th Cir. 1986), *cert. denied sub nom. Kansas City, Missouri School Dist. v. Missouri*, 108 S. Ct. 70 (1987). We held that while the facts did not justify a compulsory interdistrict remedy, the interdistrict transfer plan ordered by the district court was constitutionally justified.[1]

In footnote 30 of that opinion, we stated:

> A voluntary interdistrict program is one that has great potential for improving the racial balance in the Kansas City area. The experience in St. Louis with such a plan seems to have been favorable. The district court is correct in its holding that such a program cannot be mandatorily imposed upon the record before the court. Whether a refusal of a district to participate in such a voluntary program may evidence discriminatory intent and thus be an independent

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[1] This Court's opinion modified the district court's requirement that the State pay the KCMSD the full student foundation allotment for each student transferring out of the district and authorized the formation of a citizens committee to monitor the interdistrict transfer plan. 807 F.2d at 684.

> basis for further relief and mandatory participation is an issue that we should not anticipate.

Id. at 683 n.30. Judge Ross wrote separately to emphasize the importance of this admonition. He stated:

> At the time of argument it was my understanding that a voluntary interdistrict program, patterned along the lines of the St. Louis program was a real possibility. It would now appear that some of the districts are not moving forward with this plan.
>
> In my opinion the failure to organize and implement this program would be a very significant factor in determining discriminatory intent in the future litigation which is certain to result from the further processing of this case. The St. Louis program would be a useful model for the actions to be taken by all the Missouri districts which are parties to this action.
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> *Id.* at 687 (Ross, J., concurring).[2]

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[2] Judges Lay, Heaney and McMillian would have ordered compulsory interdistrict relief. *Id.* at 712 (Lay, C.J., dissenting). Judge Arnold dissented from that part of the court's order that held that the suburban school districts could not be required to participate in an interdistrict remedy for interdistrict school segregation caused by the State's unconstitutional housing segregation. *Id.* at 687 (Arnold, J., concurring in part and dissenting in part).

In late 1987, the Jenkins plaintiffs charged that the State of Missouri was not seriously committed to seeking the cooperation of the suburban school districts in a voluntary interdistrict program and requested the court to direct the state defendants to engage in further efforts and activities towards achieving such a program. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 14 (W.D. Mo. Jan. 7, 1988). The court acknowledged that

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I. Claims of Naylor Plaintiffs

In the summer of 1988, 184 black students applied for admission into three suburban school districts, North Kansas City, Lee's Summit, and Independence. They were denied admission. Arthur Benson, acting as counsel for the students who had been rejected, commenced an action asserting that these students had been denied admission because of their race and asking the court to order the school districts to admit them, and to order the State to pay their transportation and tuition costs. The case was initially assigned to Judge D. Brook Bartlett of the Western District of Missouri. Benson made application to transfer the case to Judge Russell Clark, who retained responsibility for the *Jenkins* case. That motion was denied. After Judge Bartlett recused himself, the case was reassigned to Judge Joseph E. Stevens, Jr. Benson made a second motion for transfer, which was also denied. On January 11, 1989, Judge Stevens granted summary judgment in favor of the State and the three school districts.

Judge Stevens reasoned that the conditions that the suburban school districts set forth in denying the black students' transfer applications were prospective only, and

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progress in achieving a voluntary interdistrict program had been slow, but denied plaintiffs' motion, stating that the newly-created subcommittee of the Desegregation Monitoring Committee was fully committed to assisting the state and the other parties in developing a program and that the subcommittee was the most effective means of achieving a successful interdistrict transfer program. *Id.*

were suggested components of voluntary interdistrict transfer plans that had not yet been finalized or approved. He held that the black students were denied admission for the 1988-89 school year only because they failed to meet the suburban districts' existing requirements for nonresident transfers. Consequently, Judge Stevens concluded that the black students' challenge to the proposed conditions for voluntary interdistrict transfers was not yet ripe.

Judge Stevens finally concluded that because none of the black students had been admitted to the suburban districts for the 1988-89 school year, the State had not violated its obligation under the June 14, 1985 order by refusing to pay their tuition and transportation costs. Plaintiffs appeal from the district court's entry of summary judgment.[3] We reverse for two reasons. First, material factual disputes remain. Second, the issue of racial motivation is not ripe for decision.

While the record is replete with allegations, affidavits, counter-affidavits, and letters between the parties bearing on the question whether the suburban school districts' refusal to accept the black students was racially motivated, one thing is clear from the record. Since June 14, 1985, not a single suburban school district has admitted a single black student from the KCMSD pursuant to a

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[3] We have consolidated this appeal with that in *Jenkins v. Missouri*, No. 89-1957. The *Jenkins* class appeals Judge Clark's denial of its motion to compel the State of Missouri to fund VIT expenses for the 1988-89 school year. Judge Clark denied the motion as moot because the suburban school districts admitted no KCMSD transfer students for the 1988-89 school year.

plan negotiated by the State and the suburban school districts. While there may be many reasons contributing to this failure, it seems clear to us that a very important one is the State's refusal to pay transportation costs and tuition for students until a VIT plan has been negotiated with the suburban districts and approved by the district court. Meanwhile, no suburban district is willing to accept any transfer student until it is assured that it will receive State funding. Although we cannot say with certainty that the State and the suburban school districts would never agree to a VIT plan on their own, after five years, we believe that further delay cannot be countenanced. The time has come for the district court itself to formulate and implement a plan. We therefore remand to the district court with directions to it to reassign the case to Judge Russell Clark, the judge currently responsible for the *Jenkins* litigation. He should then initiate a plan, the essentials of which will include the elements set forth in his order of July 14, 1985, as modified and as repeated earlier in this opinion. In addition, the plan will include the following provisions:

(1) The State shall not be required to pay VIT costs for more than 1,200 students in the 1990-91 school year, 2,400 students in the 1991-92 school year, 3,600 students in the 1992-93 school year, 4,800 students in the 1993-94 school year, and 6,000 students in the 1994-95 school year and thereafter.[4]

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[4] In *Liddell v. Missouri*, the settlement agreement for desegregation of the St. Louis schools called for a similar interdistrict transfer plan. *Liddell v. Missouri*, 731 F.2d 1294, 1302

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(2) The State shall not be required to pay VIT costs for black students who transfer to a suburban school district in which blacks already constitute 25% or more of the student body.[5]

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(8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984). Under that program, city-to-county transfers of black students were to be permitted to grow incrementally until they reached 15,000. *Id.* The district court and this court approved the settlement agreement. *Id.* at 1302-09; *Liddell v. Board of Educ.*, 567 F. Supp. 1037, 1055 (E.D. Mo. 1983). Thereafter, questions were raised about the 15,000 ceiling on transfers and we reiterated our support for this limit. *See Liddell v. Board of Educ.*, 873 F.2d 191, 193-94 (8th Cir. 1989). To date, only about 12,000 black St. Louis students have transferred from the city to the county. Voluntary Interdistrict Coordinating Council Progress Report, table 3 at 4 (unpublished report, Feb. 10, 1989).

The 6,000 limit placed on city-to-suburban transfers in this case is a more modest one than the 15,000 placed on transfers in *Liddell* for the following reasons:

1. The number of minority students enrolled in the KCMSD is significantly less than the minority enrollment in the St. Louis district. *See* F. Welch & A. Light, *New Evidence on Desegregation*, table A2 at 79 (1987) (Kansas City had 26,828 minority students in 1985; St. Louis, 40,068).

2. The Kansas City suburban schools enroll fewer students than do the St. Louis suburban schools.

3. Because the Kansas City plan emphasizes city magnet schools to a greater degree than does the St. Louis plan, the number of interdistrict transfers needed to achieve desegregation in Kansas City is less than that needed in St. Louis.

The district court remains free to revise the limits set forth herein if it believes such modifications are necessary.

[5] In *Liddell*, the district court and this court approved a plan providing that no suburban school district would be

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(3) The plan shall be implemented at the beginning of the 1990-91 school year.

If the district court permits the plaintiffs, the *Jenkins* class, the State, the suburban school districts, or others to make additional suggestions as to the contents of the VIT plan, we make it clear that the suggestions or arguments in support thereof that are communicated to the court are not to be used as evidence of racial animus in any future proceedings.

We believe that the litigation should be stayed pending the promulgation and implementation of a VIT plan. We leave to the district court's discretion the decision of what action to take respecting the stay after a VIT plan has been promulgated and a period of time appropriate for its implementation has elapsed.

II. Sanctions

Judge Stevens imposed sanctions of $83,761.59 on Benson, appellants' attorney, after entering summary judgment in favor of all defendants. Judge Stevens sanctioned Benson because plaintiffs' claim that the suburban school districts treated black transfer applicants differently from white transfer applicants was frivolous, because Benson withdrew a motion for a preliminary

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required to accept more black transfer students than would raise the overall percentage of blacks in the total student population higher than 25%. 731 F.2d at 1302 n.7. We adopt the same limitation here.

injunction after asserting that plaintiffs would be satisfied only with immediate relief, and because Benson filed a second motion to transfer the case to Judge Clark after his first such motion had been denied.

We apply a three-pronged review to a district court's award of Rule 11 sanctions. *E.E.O.C. v. Milavetz & Assocs., P.A.*, 863 F.2d 613, 614 (8th Cir. 1988). Factual findings supporting the sanctions are reversed only if clearly erroneous, the legal conclusion that Rule 11 has been violated is reviewed de novo, and the appropriateness of the sanction is reviewed for abuse of discretion. *Id.*

Judge Stevens found frivolous that portion of plaintiffs' complaint alleging that the suburban school districts treated black transfer applicants differently from their white counterparts.[6] In our view, this allegation is not so frivolous as to warrant Rule 11 sanctions. Plaintiffs presented letters written by the school districts to parents of the unsuccessful transfer applicants containing proposed conditions for transfers clearly tied to the ongoing Kansas City school desegregation litigation. These conditions could not be applied to white transfer applicants who were not parties to the desegregation litigation. Additionally, we do not believe plaintiffs' complaint is as easily divided into two separate claims, one frivolous and one not, as Judge Stevens concluded it was.

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[6] Judge Stevens originally found the entire claim to be sanctionable. On reconsideration, however, the court concluded that plaintiffs' allegation of discriminatory intent was prompted by this Court's decision in *Jenkins v. Missouri*, 807 F.2d at 683 n.30. Accordingly, Judge Stevens ordered Benson to pay half the defendants' attorney's fees.

The plaintiffs' allegations arose out of a single set of facts, the suburban school districts' denial of their transfer applications. Plaintiffs filed their suit in August 1988, shortly after their applications were denied, and sought relief to take effect for the 1988-89 school year. In view of the limited time in which Benson had to act, we believe that the complaint he filed on plaintiffs' behalf was, to the best of his knowledge after a reasonable investigation, well grounded in fact and warranted by a good faith argument for the extension or modification of existing law. *See* Fed. R. Civ. P. 11; *see also id.* advisory committee note (what constitutes a reasonable inquiry may depend on the amount of time for investigation available to the signer).

Judge Stevens also based the sanction award on Benson's second motion to transfer the case to Judge Clark. In our view, the Naylor plaintiffs' claims are inextricably involved with the *Jenkins* litigation and this case should have been assigned to Judge Clark in the first place. We believe Benson's motions to transfer were not intended to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation, but were instead intended to place identical issues before a single decision maker. Accordingly, we vacate the order of the district court imposing sanctions on Benson.

CONCLUSION

In conclusion, we repeat what we have said before. The interests of the students of the KCMSD and the suburban districts will be well served if all the parties see

fit to participate in the VIT plan to be promulgated by the district court.

JOHN R. GIBSON, Circuit Judge, concurring.

I concur in the result the court reaches today and write separately only to explain more completely my reasons for concluding that the rulings of the district court should be reversed.

This case demonstrates the difficulty of determining complex cases involving school desegregation, and the attendant issues of discriminatory intent, by summary judgment. Text writers have discussed the inapplicability of summary judgment in such cases.[7]

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[7] Professors Wright, Miller, and Kane have stated that:

> Cases premised on alleged violations of the constitutional or civil rights of plaintiffs frequently are unsuitable for summary judgment. As is true with cases involving important public issues, courts may refuse to grant summary judgment in these actions because it is felt that a fuller record is necessary in order to be able to decide properly the issues involved. Further, the very nature of the claims involved often presents factual issues that require summary judgment to be denied.
>
> In many constitutional and civil rights cases, a necessary element of the claim for relief presents an inquiry into the state of mind of one or more of the parties. . . . [C]laims requiring a determination regarding intentions or motives are particularly unsuitable for summary adjudication. . . .
>
> Finally, in actions charging various forms of discrimination, in violation of the constitution or some

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This is just such a case involving the question whether there was discriminatory intent on the part of three suburban school districts, which necessarily involves an analysis of the actions, practices, decisions, and policies of school boards and of those delegated to assist the boards in carrying out their responsibilities. This is not a case where a minimal record exists, since the record before the district court consisted of some 1,983 pages. Recent Supreme Court decisions amplifying the scope of summary judgment under Federal Rule of Civil Procedure 56 do not support the district court's grant of a summary judgment in this case. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), makes it plain that drawing legitimate inferences from the facts is a function for the fact-finder and:

> [t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Id. at 255 (citations omitted).

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> statute, material fact issues may exist concerning whether the defendant intended or knowingly discriminated, thereby precluding summary judgment. Thus, for example, in cases alleging sexual or racial discrimination in employment or housing, an examination of motive and intent usually is involved, making the granting of summary judgment especially questionable.

10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2732.2, at 340-51 (2d ed. 1983) (footnotes omitted).

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), also underscores the necessity for genuine issues of material fact to defeat summary judgment. As *Matsushita* demonstrates, the substantive law in an area can limit the range of permissible inferences that can be drawn from a set of facts. *See id.* at 587-88.

The Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), made the following statements that must guide this court in determining whether there is an issue for trial:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action – whether it "bears more heavily on one race than another," *Washington v. Davis*, [426 U.S. 229, 242 (1976)] – may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion [v. Lightfoot*, 364 U.S. 339 (1960)] or *Yick Wo [v. Hopkins*, 118 U.S. 356 (1886)], impact alone is not determinative, and the Court must look to other evidence.
>
> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural

> sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

429 U.S. at 266-67 (citations and footnotes omitted).

As the court's opinion today points out, four years have passed, no plan has been adopted, and not one black student has been voluntarily transferred from KCMSD to a suburban school district.[8] The record before the district court demonstrated that two of the districts, North Kansas City and Independence, had, over the last several years, declining enrollments which would indicate the availability of physical plant space. The record also reveals that in 1986 the Lee's Summit Schools had a 1.4 percent black enrollment and the Independence Schools had a 1.8 percent black enrollment, while the North Kansas City Schools' student body was: 1.7 percent black, 2.7 percent Hispanic, 1.2 percent Asian-Pacific, and .4 percent American Indian or Alaskan Native, for a total minority enrollment of 6 percent. (Jt. App. at 1163-65).[9]

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[8] Judge Ross' concurring opinion in *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) [hereinafter *Jenkins I*], expressed the opinion that failure to organize and implement a voluntary interdistrict program would be a significant factor in determining discriminatory intent in future litigation. *Id.* at 687 (Ross, J., concurring).

[9] While not in the record before the district court, publicly available enrollment figures demonstrate that black enrollment has continued to increase in four non-party suburban school districts, Center, Grandview, Hickman Mills, and Raytown, the

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The Naylor Class argues with some force that the district court's analysis unduly focused upon whether the suburban school districts' "nonresident policies had the foreseeable consequence" of preventing the plaintiff class from attending the suburban school districts based on their race, and failed to properly evaluate the practices of the suburban school districts in light of all the principles underscored in *Arlington Heights*. I am also convinced that the district court erred in viewing the actions of the suburban school districts as merely preliminary proposals which could not serve as the basis for a finding of invidious discrimination. The entire situation before us simply demonstrates that the suburban school districts and the State have failed to make any headway toward the development of voluntary interdistrict transfer plans, and that each utilizes the inaction of the other as an excuse for its refusal to act.

I am satisfied that a review of both the policies and practices of the individual suburban school districts demonstrates that there is a genuine issue of material fact concerning the question of discriminatory intent.

When Naylor Class members requested admission to the Independence School District, the district responded by stating that the children would be admitted only if: (1) the State agreed to build and turn over to the district a new elementary school; (2) the district was reimbursed

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districts that we recognized had made steady increases in black enrollment in *Jenkins I*, 807 F.2d at 664 n.9. Insofar as this may be material in this case, the district court on remand may make appropriate inquiry and findings.

for its expenses in the prior *Jenkins* litigation and indemnified against the cost of future litigation arising out of the transfer program; and (3) the *Jenkins* Class attorneys agreed to not represent the children with respect to the district. These conditions were all set forth in a July 22, 1988, letter to Dr. Terry Stewart, Coordinator for Administrative Services, of the State Department of Elementary and Secondary Education. (Jt. App. at 1143-45). Moreover, while the Independence School District had an official non-resident student policy authorizing admission of four categories of students, (Jt. App. at 1083), the district referred to only one of those categories, namely non-resident students whose parents owned real estate in Independence, in a letter to Dr. Stewart dated February 10, 1987, (Jt. App. at 1118-19). The evidence also disclosed that in the five school years between 1984 and 1989, the district had admitted 115 special education students, of whom 108 were white, three were black, and four were members of other minority groups. The district also admitted eight white students from the Drumm Farm, a residential institution for children. (Jt. App. at 1387). Those students were not within any of the categories described in the district's non-resident policy. The Naylor Class asks why the district strictly adhered to its non-resident policy to reject the black children while at the same time violating its policies in order to accept the predominantly white special education children. That question raises the issue of whether the Independence district has departed from normal procedures and created special conditions for the Naylor Class such as those referred to in *Arlington Heights*. I am satisfied that these are issues that preclude summary judgment.

Lee's Summit had maintained a policy allowing students not residing in Lee's Summit "to attend the district's schools upon payment of tuition as established by the Board." (Jt. App. at 1088). On July 27, 1988, the district wrote Dr. Stewart to inform the State of the district's decision to not accept the plaintiffs, because the State would not pay their tuition. (Jt. App. at 1151). When counsel for the *Jenkins* Class informed the district that the plaintiffs would fulfill reasonable tuition requirements that the district would determine, (Jt. App. at 1154-55), the district answered that the students were denied admission because they did not satisfy the district's admission policy and practice, which focused on residency and property ownerships. (Jt. App. at 991). Later, an affidavit from the former board president stated that the district's policy was to accept non-resident students only to the extent required by law or to allow students to continue where the family had moved out of the district. Again, the district's shifting rationale and its failure to follow its own expressed policy both implicate the principles in *Arlington Heights* and create an inference of discriminatory motive.

The North Kansas City School District had a policy allowing the enrollment of non-residents in several specified categories.[10] When the request was made for

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[10] These included children enrolled in special education programs, children whose families had moved from the North Kansas City School District, orphaned children, children whose legal residence was found to exist in the district by a court, foreign and domestic exchange students, and children of a non-resident person paying a school tax in the district. (Jt. App. at 1115-17).

transfer by members of the Naylor Class, the district wrote to the State and to the parents of the black children stating that the children would be admitted only if: the district retained sole and final authority to accept or reject applicants; the students' parents or guardians pledged to support the students' educational activities and to be immediately available for consultation with school officials; certain school districts in the State of Kansas also agreed to accept KCMSD students; the State, KCMSD, and the plaintiff class provided full and unqualified indemnity to the district; KCMSD and the plaintiff class agreed to not pursue future litigation against the district; the district was fully reimbursed for all of the district's fees, expenses, and costs from both the previous *Jenkins* litigation and its investigation of voluntary programs; and a set aside fund was placed under the district's control for a five-year period to partially insure the required indemnities. (Jt. App. at 1130-38). I am convinced that these conditions, particularly the reimbursement of the earlier *Jenkins* litigation expenses, could raise an inference of discriminatory intent, because they are imposed against only one group of transfer students: the group of black students seeking admission.

As part of the response to the motion for summary judgment, the class filed affidavits from two Professors of Sociology, Dr. Robert L. Crane of Columbia University's Teachers College, and Dr. Mary R. Jackman of the University of Michigan, both claiming to be knowledgeable in the area of racial attitudes. Both of them analyzed the letter from the North Kansas City School District and expressed opinions in detail that the letter demonstrated racially discriminatory intent. These opinions are further

support for the conclusion that factual issues were presented.

The record also reveals that North Kansas City School District had accepted non-residents if it was able, and the student's home district was unable, to meet the applicant's educational needs and if tuition was paid by the home district. Those accepted were routinely white, coming from home districts that were nearly all white.

In view of our determination that we must remand the issues with respect to the three suburban school districts for further proceedings, and in view of our earlier orders requiring that the State take the lead in developing voluntary interdistrict transfer plans, I believe that we need say no more concerning the need for remand as to the State.

A few further words are in order concerning the refusal to transfer this case to Judge Clark, who has presided over the *Jenkins* litigation. Evidently when filed, the *Naylor* case was assigned to a different division under the procedures of the clerk's office. Motions to transfer or consolidate were then denied. The order of the district court, however, in ruling on *Naylor*, made numerous references to Judge Clark's participation in *Jenkins*. In that order, the court questioned whether the eleven criteria of the North Kansas City School District's letter would qualify as an appropriate voluntary transfer plan under Judge Clark's order in *Jenkins*. *Naylor v. Lee's Summit Reorg. School Dist. R-7*, 703 F. Supp. 803, 816 n.17 (W.D. Mo. 1989).[11] In considering the liability of the State, the

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[11] The district court stated that several of the conditions in the North Kansas City School District's proposal were perhaps

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district court referred to Judge Clark's order and held that it did not have jurisdiction to decide whether the State had a duty to fund a voluntary interdistrict plan, as these requirements stem from Judge Clark's remedial order, and it was for him to make this determination. *Id.* at 818. The court also acknowledged Judge Clark's role in formulating a voluntary plan as well as the right of the State to challenge its responsibility to finance tuition and transportation of students in such a plan, which it could not find to be evidence of discrimination against plaintiffs in the case before it. These references to the *Jenkins* litigation pending before Judge Clark and to the need for action by him in that case point to the interrelationship of the *Naylor* case with *Jenkins* and the desirability of determining all of the voluntary transfer issues in one court, that responsible for the *Jenkins* litigation.

Interestingly, the district court in *Naylor* pointed to the prematurity of the issues because the North Kansas City School District's proposal was not yet a final plan. That proposal was predicated upon the State's willingness to pay tuition for the transfer students. Lee's Summit refused to accept transfer students because of the State's refusal to pay tuition. The State argued successfully before Judge Clark that whether the State had to fund voluntary transfer plans was a moot question, because no plans existed. These circular rationalizations, with the

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in violation of the equal protection clause, and questioned whether they would pass constitutional muster standing on their own, but further concluded that the issue was not before it. *Id.* at 816.

suburban school districts refusing to adopt a plan because the State has not made funds available, and the State arguing that there is no voluntary plan for it to fund, make the remand to fashion a voluntary plan essential. It also underscores the desirability of a stay of further litigation in *Naylor*. The parties' efforts to develop and implement a voluntary interdistrict plan will be strong evidence for consideration by the court when a stay of this litigation is lifted.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-2452

Jennifer T. Naylor and Eric J. Naylor, by their next friend Reverend James Naylor; Dwayne Shores, by his mother and next friend Rose Shores; Adrian R. Dean, Tanisha M. Johnson, Andrea L. Johnson, and Gregory T. Johnson, by their mother and next friend Patience M. Johnson; Kevin Dion Innis, by his mother and next friend Linda Innis; Deidra Jovan Rayfield, by her mother and next friend Latricia Rayfield McArn; Nicole R. Griffith, by her father and next friend Raymond B. Griffith, Sr.; Chrissean King, by his mother and next friend Patti King; Ronale M. Dunn, by his mother and next friend Janice Dunn; LaShonda M. Gross, by her father and next friend Michael L. Gross; Jerry Steve Roggett, by his grandmother and next friend, Martha M. Anderson; and Bryant Tucker,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

by his mother and next friend Gladys Tucker,

Appellants,

Arthur A. Benson, II,

Appellant,

v.

Lee's Summit Reorganized School District R-7; Dr. Gail Williams, Acting Superintendent thereof; and Robert Jones, Robert Bruce, James Coleman, John Patterson, Margaret Piepergerdes, Sherry Sims, Members of the Board of Education thereof; North Kansas City, Missouri School District; Dr. Gene Denisar, Superintendent thereof; and Freddie Nichols, Rick Moore, Sandra Clark, Mary Smith, Bill Trickey, Joe Jacobs, Wes McCullough, Members of the Board of Education thereof; School District of the City of Independence; Dr. Robert Henley, Superintendent thereof; and Sharon Williams, Helen French, Michael Barnett, Ronald Sinke, Sharon Floyd, Phillip Parrino, Members of the Board of Education thereof; The State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Robert Bartman, Commissioner of Education of the State of Missouri; and

Roseann Bentley, Dan Blackwell, Pres. Terry A. Bond, Delmar A. Cobble, Grover Gamm, Jimmy Robertson, Robert L. Welling, Donald E. West, Members of the Missouri State Board of Education,

Appellees.

Filed: May 23, 1990

Before LAY, Chief Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges.

The suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc. Judges Bowman and Wollman dissent from the denial of the petition for rehearing en banc. The petition for rehearing is also denied. The panel opinion in that matter, which was consolidated with No. 89-1957, *Kalima Jenkins, et al. v. The State of Missouri, et al.*, and filed April 2, 1990, is withdrawn. A substituted opinion in both matters is filed simultaneously with this order.

BOWMAN, Circuit Judge, dissenting.

I respectfully dissent from the denial of the suggestion for rehearing en banc of the panel opinion filed April 2, 1990. The panel now has filed a modified opinion and

has withdrawn the April 2, 1990 opinion.[1] Unfortunately, the modified opinion is as flawed as its predecessor.

Even though the panel takes pains in the modified opinion to make it appear the suburban school districts are being given a choice in the matter, the reality is that the Court effectively is decreeing a massive compulsory interdistrict transfer plan, one that the suburban districts will be forced to accept and implement on pain of being found guilty by this Court of racial discrimination if they do not. The question before us is whether a so-called voluntary transfer plan can be anything but compulsory when this Court already has signalled, in unmistakable terms, that the suburban school districts' refusal to accept large numbers of transfer students from the Kansas City School District pursuant to "a voluntary interdistrict program" will be "a very significant factor in determining discriminatory intent in the future litigation." *Jenkins v. Missouri*, 807 F.2d 657, 687 (8th Cir. 1986) (Ross, J., concurring) (*Jenkins* I), quoted with approval in the modified opinion of the panel majority at page 6 and Judge John R. Gibson's concurring opinion at page 16 n.7. The modified opinion of the panel majority at page 6 also quotes approvingly from footnote 30 of *Jenkins* I, which lauds the virtues of voluntary interdistrict transfer programs and concludes, ominously, that, "Whether a refusal of a district to participate in such a voluntary program may evidence discriminatory intent and thus be an independent basis for further relief and mandatory participation

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[1] The modified panel opinion is being filed simultaneously with this order denying rehearing en banc.

is an issue that we should not anticipate." *Jenkins*, 807 F.2d at 683 n.30.

The case thus takes on an Alice-in-Wonderland quality. On the one hand, the suburban districts, not having been found guilty of a constitutional violation (and therefore having been dismissed from the *Jenkins* case) cannot judicially be compelled to take part in an interdistrict remedy. On the other hand, our Court has made them an offer they can't refuse: unless they start "voluntarily" admitting transfers from the Kansas City School District, they will be adjudged to be violating the Equal Protection Clause, and then will be subject to the full remedial powers of the federal courts. I think no more than this need be said to demonstrate the unmistakably coercive nature of the panel opinion.

An interdistrict transfer plan might or might not be a good thing. That is not the issue. The issue is the constitutional allocation of power, and whether our Court has been faithful to it. Clearly it has not. Instead, what we have here is a raw exercise of power in pursuit of what the Court perceives to be a noble purpose, namely, the dispersion of black students from the inner city into the mostly white suburban districts. This decision, if it is not overturned, will stand as a monument to the often tempting but always pernicious doctrine that arguably worthy ends justify illegitimate means. Moreover, it may have unintended practical consequences that will cause great harm to innocent school districts. When we tinker with local arrangements, we do so at great risk to the health of the body politic. Only when the Constitution commands it are we justified in intruding. Here, it cannot even be

pretended that the Court's coercive order has a constitutional basis.

I am also troubled by the implicit premise that appears to guide the panel opinion, that premise being that black children somehow will be better off if they are removed from classrooms where they enjoy majority status and are transported to more distant classrooms where they will comprise a distinct minority. If this be truth, it certainly is not of the self-evident variety. The premise seems especially hollow here in view of the vast sums of money that are being judicially compelled from unwilling taxpayers to make the Kansas City School District second to none in the opulence of its facilities and in the plenitude of its educational frills. In any event, the idea that a good education for black students requires their submersion in a sea of white students strikes me as being patronizing and demeaning to blacks. As far as I know, it is unsupported by any empirical evidence. I find it offensive.

My essential quarrel with the panel opinion, however, is that it goes further than any court has the right to go. The words of Justice Kennedy, dissenting in *Missouri v. Jenkins*, 58 U.S.L.W. 4480, 4493 (U.S. Apr. 18, 1990), are apposite here:

> James Madison observed: "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit." The Federalist, No. 51, p. 352 (J. Cooke ed. 1961). In pursuing the demand of justice for racial equality, I fear that the Court today loses sight of other basic political liberties guaranteed by our constitutional system, liberties that can

coexist with a proper exercise of judicial remedial powers adequate to correct constitutional violations.

For the reasons I have briefly stated, I would grant the petition for rehearing en banc on all the issues raised by the petition. As I read the petition, it asks us to rehear, *inter alia*, the issue whether the District Court properly granted summary judgment in favor of the suburban districts on the discrete claim of discrimination that is the gravamen of the *Naylor* appellants' complaint. I here express no opinion on the merits of that issue. I observe, however, that even if the *Naylor* appellants were ultimately to prevail on their discrimination claim, the sweeping relief that our Court has ordered would not be justified. When a state (or one or more of its subdivisions) is found to have violated the Constitution, the remedy should be precisely tailored to right the constitutional wrong, and should intrude no more than necessary upon state and local prerogatives. *See Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). Here, our Court flouts that salutary teaching by effectively ordering (while pretending not to do so) a blunderbuss remedy that goes light years beyond anything that would be necessary to correct the constitutional violation alleged in the *Naylor* appellants' complaint – and it does so despite the District Court's grant of summary judgment for the suburban districts and despite the panel majority's concession that "a material factual dispute remains respecting the suburban school districts' racial motivation in refusing to accept black transfer students from the KCMSD." *Naylor v. Lee's Summit Reorganized School Dist.*, No. 89-2452, slip op. at 8 (8th Cir. May ___, 1990).

Our Court has acted with the best of intentions. Good intentions, however, are not an adequate substitute for constitutional authority, which here is sorely lacking. Nor do good intentions excuse judicial abuse of the Court's de facto ability to bully litigants into submission not to the law but to the Court's will. The illegitimacy of what the panel has done is so painfully obvious that I find it difficult to believe a majority of the judges of this Court would not feel duty-bound to grant the petition for rehearing en banc.

WOLLMAN, Judge, dissenting.

I agree with much of what is said in Judge Bowman's dissenting statement, and I too would grant the petition for rehearing in banc on all of the issues raised by the petition.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

Jennifer T. NAYLOR, et al., Plaintiffs,

v.

LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT R-7, et al.,

Defendants.

No. 88-0767-CV-W-8.

United States District Court,
W.D. Missouri, W.D.

Jan. 11, 1989.

MEMORANDUM OPINION AND ORDER

STEVENS, District Judge.

Plaintiffs filed this lawsuit on August 9, 1988 alleging that the defendant school districts refused them admission as nonresident students in violation of the Fourteenth Amendment to the Constitution of the United States, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* and 42 U.S.C. §§ 1981 and 1983. Plaintiffs seek a permanent injunction of the enforcement of defendant school district's admission requirements for black nonresident students, as well as monetary damages for the violation of each plaintiff's constitutional rights. Several motions are currently before the court: motions to dismiss and motions for summary judgment filed by each of the defendant suburban school districts (SSDs); the motion of the state defendants for summary judgment and the plaintiffs' alternative motion for partial summary judgment against the state defendants; and the joint motion of the defendant school districts for sanctions

pursuant to Fed.R.Civ.P. 11.[1] The Court will address these motions in three groups: school districts' dispositive motions, state's motion and plaintiffs' cross motion, and motion for sanctions.

I. *Facts*

Plaintiffs in this suit, each of whom is black and resides within the boundaries of the Kansas City, Missouri school district (KCMSD), attempted to enroll in either the Lee's Summit Reorganized School District (LSRSD), the North Kansas City, Missouri School District (NKCSD) or the Independence School District (ISD) but were refused admission because they were not residents of the school district and did not fall within any of the district's guidelines for the admission of nonresident students. On January 6, 1989 the court certified this case as a class action[2] with three subclasses, one for students applying to each of the defendant SSDs. As will be discussed in greater detail later in this opinion, each of the school districts gave somewhat different reasons for refusing to enroll plaintiffs although each of the districts justified its decision, at least in part, on the fact that plaintiffs were not residents of the district to which they applied nor did they fall within any of the exceptions allowing for the admission of nonresident students.

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[1] Although no formal written motion has been filed, the state joins in this motion. *See, infra,* at 819.

[2] Each of the plaintiffs in this case is also a member of the class in *Jenkins v. State of Missouri*. *See* Transcript of Aug. 18, 1988 Hearing at 25. In other words, the *Naylor* class is a subgroup of the *Jenkins* class.

Each of the students here involved attempted to enroll in one of the defendant suburban school districts because of Judge Russell G. Clark's decision in *Jenkins v. State of Missouri*, 639 F.Supp. 19 (W.D. Mo.1985), *aff'd*, 807 F.2d 657 (8th Cir.1986), *cert. denied sub nom., Kansas City, Missouri School District v. Missouri*, ___ U.S. ___, 108 S.Ct. 70, 98 L.Ed.2d 34 (1987). In that order Judge Clark directed that "the State of Missouri shall actively seek the cooperation of each school district in the Kansas City, Missouri metropolitan area in a voluntary interdistrict transfer program." *Id.* at 38. Plaintiffs allege that defendants had a duty, under Judge Clark's order, to develop nondiscriminatory voluntary interdistrict transfer programs (VITs) and that the school districts' refusals to admit the plaintiffs as nonresident students were based on race and, therefore, constituted a violation of plaintiffs' constitutional rights.

The plaintiffs began preparations to enroll in the SSDs in May 1988. At that time plaintiffs' attorney wrote a letter to George Feldmiller, one of defendants' attorneys, stating that the plaintiffs and KCMSD district had developed a proposal for a VIT program under which plaintiffs would present themselves for admission at one of the defendant SSDs. Appendix to Plaintiffs' Memorandum, Exhibit 11 (hereinafter "Appendix"). The defendant SSDs responded that they were working with the state on proposals of their own and warned that any overstepping or threats of litigation by the plaintiffs would slow the process. Correspondence was exchanged throughout the summer months between the respective counsel for plaintiffs, the SSDs and the state. None of the SSDs had a plan in effect by late summer of 1988 and, consequently, each

of the plaintiffs attempted to enroll in one of the defendant districts pursuant to the plan proposed by counsel for plaintiffs in May. Their applications were rejected and this litigation followed.

In order to understand the issues raised by this lawsuit it is necessary briefly to review the previous Kansas City, Missouri desegregation litigation, especially the court's orders in *Jenkins*. All of the defendants, as well as other SSDs, were originally named as defendants in *Jenkins* but on June 5, 1984 Judge Clark dismissed the suburban school district defendants from *Jenkins* because they were not constitutional violators under the standards announced by the Supreme Court in *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). *See Jenkins v. Missouri*, No. 77-0420 (W.D.Mo. June 5, 1984) (unpublished opinion). As a result of this finding, Judge Clark concluded that the suburban districts could not be required to participate in an interdistrict remedy to desegregate the Kansas City, Missouri School District. *Id.* at 103-04. Judge Clark later ordered, however, that the state of Missouri, as a constitutional violator, had a duty to seek the cooperation of the suburban school districts in a voluntary interdistrict transfer program and to pay all transportation and tuition costs of any black KCMSD student wishing to transfer to a suburban school district where their race was in the minority. *Jenkins*, 639 F.Supp. at 38. Judge Clark noted that "[i]f any of the suburban districts volunteer to participate in inter-district transfers, the program shall begin with the 1986/87 school year."[3] *Id.* at 39.

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[3] A question exists as to whether the transfer program proposed by plaintiffs and at issue in this case falls under the

(Continued on following page)

While Judge Clark's order encouraged the development of VIT programs, he clearly stated that the

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umbrella of Judge Clark's remedy order. In that order Judge Clark noted that *"the state of Missouri shall actively seek* the cooperation of each school district in the Kansas City, Missouri metropolitan area in a voluntary interdistrict transfer program." (emphasis added.) The state argues that it was not required to fund the tuition and transportation costs of the plaintiff students in this case because the plan was established by plaintiffs rather than by the state of Missouri. The Desegregation Monitoring Committee (DMC), established pursuant to Judge Clark's remedy order, 639 F.Supp, at 41-43, found that the state had a duty to fund these transfers under the court's order in *Jenkins*. The state appealed that decision to Judge Clark. On November 29, 1988 Judge Clark issued an order denying the state's appeal of the DMC's decision as moot since the parties agreed that no students would be attending the SSDs during the 1988-89 school year. The state also appealed that portion of the DMC's decision which found that the plaintiffs' plan to seek voluntary inter-district transfers was consistent with Judge Clark's order in *Jenkins*.

Judge Clark affirmed the DMC's decision, noting that "there is nothing in the prior [*Jenkins*] orders preventing the other parties from seeking the cooperation of other school districts in a VIT program. This is evidenced by the Court's statement that 'the newly created voluntary interdistrict transfer subcommittee of the Desegregation Monitoring Committee is fully committed to assisting the State *and the other parties* in developing a voluntary interdistrict transfer program.' " *Jenkins*, No. 77-0420-CV-W-4 (Nov. 29, 1988) at 5 (unpublished opinion) (quoting January 7, 1988 Order at 14) (emphasis added to original). Judge Clark gave plaintiffs twenty days to demonstrate that their proposed VIT program, the program under which plaintiffs in the present case applied to the SSDs, meets the requirements set forth in the court's earlier *Jenkins*

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participating districts would not have unlimited discretion over how the programs operated, noting that

> [t]he receiving district will agree not to reject individual applicants unless there is a history of serious disciplinary problems, will allow the transfer student to remain in attendance until such student graduates or returns to the student's home district, as long as that student satisfies all academic and other standards applicable to all resident students, will treat interdistrict transfer students in the same manner, in all regards, as they treat resident students, and will permit KCMSD to recruit applicants for interdistrict transfers within its district.

Id. at 39.[4]

The Eighth Circuit affirmed Judge Clark's dismissal of the suburban school districts, holding that the district court did not err in finding that the SSDs were not constitutional violators and, therefore, that a mandatory interdistrict remedy was not permissible under *Milliken*. *Jenkins by Agyei v. State of Missouri*, 807 F.2d 657, 664 (8th Cir.1986), *cert. denied sub nom., Kansas City, Missouri School District v. Missouri*, ___ U.S. ___, 108 S.Ct. 70, 98 L.Ed.2d 34 (1987). The court noted in the footnote, however, that although the district court did not have the power to

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order. Plaintiffs' response was due December 19, 1988 and defendants were given an extension of time until January 10, 1989 to reply. As of this date, Judge Clark has not ruled on the state's motion to reconsider the decision of the DMC.

[4] The "Monitoring Committee" refers to the Desegregation Monitoring Committee, a committee established by Judge Clark to oversee the desegregation remedy.

mandate a voluntary interdistrict transfer program, the refusal of a district to participate in such a program could be evidence of a constitutional violation. Specifically, the court stated that "[w]hether a refusal of a district to participate in such a voluntary program may evidence discriminatory intent and thus be an independent basis for further relief and mandatory participation is an issue that we should not anticipate." *Id.* at 683, n. 30.[5] Judge Ross wrote a separate concurring opinion "to emphasize to the parties in this case the importance of the admonition in footnote 30." Judge Ross emphasized that "the failure to organize and implement this program would be a very significant factor in determining discriminatory intent in the future litigation which is certain to result from the further processing of this case." *Id.* at 687 (Ross, J., concurring).[6]

Plaintiffs contend that footnote 30, coupled with Judge Ross' separate concurrence, establishes that the suburban school districts could be found liable for a constitutional violation, separate and distinct from that litigated in *Jenkins*, if the SSDs unlawfully discriminated

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[5] The majority opinion was written by Judge John R. Gibson and joined by Judges Ross, Fagg and Wohlman.

[6] Judge Arnold dissented from that part of the majority opinion finding that the SSDs did not have a duty to participate in an interdistrict remedy. Judge Lay, joined by Judges Heaney and McMillan, dissented from the majority opinion because they found that the majority misinterpreted the Supreme Court's decision in *Milliken* and they believed that the SSDs should have been required to participate in an interdistrict remedy. Judge Bowman did not participate in the court's consideration of the case.

against plaintiffs by refusing to participate in plaintiffs' proposed voluntary interdistrict transfer plan. Specifically, plaintiffs allege that the reasons advanced by the SSDs for refusing to admit the plaintiffs as nonresident students were merely pretextual and that the true reason that the defendant SSDs did not admit plaintiffs was that they did not want black KCMSD students in their schools. Defendants refute this contention, arguing that plaintiffs' claims are precluded by the Eighth Circuit's decision affirming Judge Clark's dismissal of the SSDs in the *Jenkins* litigation. In addition, defendants argue that plaintiffs were refused admission to the SSDs not because they were black KCMSD students but because they did not meet the requirements for admission of nonresident students as established by the separately stated written policies of each of the defendant suburban school districts.

A. Lee's Summit Nonresident Policy

The most current Lee's Summit Reorganized School District policy regarding admission of nonresident students was approved on October 8, 1987 and contains three exceptions to the general policy that nonresident students will not be accepted to LSRSD schools. First, the school district will accept, on a tuition paying basis, any student originally attending the school district as a resident student who later moves out of the district, so long as the student remains in continuous enrollment. The district will also give a tuition/tax credit to any nonresident student whose parents or guardians pay school taxes on property located within the district. Finally, any student whose parents anticipate moving into the district

and have a house currently under construction will be admitted and are provided a ninety-day grace period before tuition must be paid. Appendix, Exhibit 9B.

The board's policy also allows nonresident students to attend the LSRSD without paying tuition, or upon payment of partial tuition, under the following circumstances: if the student lives with a grandparent with the parents' permission and the purpose of the living arrangement is not solely to allow the child to attend the Lee's Summit Schools; if the student is an orphan who has a permanent or temporary home within the school district; if a child lives with one parent and has a permanent or temporary home within the district; if a child has parents who do not contribute to his or her support and the child is unable to pay tuition but has a permanent or temporary home within the district; if the student is sponsored by an agency meeting the standards specified in a policy titled "Policy JECBA";[7] and/or if the student moves out of the district after the end of the third quarter of the school year, he or she may attend school in the district for the balance of the term.

Affidavits of various officials of the LSRSD established that it has been the board's policy to allow only students falling into one of the above categories to attend a school located within the district as a non-resident student. *See* Affidavit of Stan Magady, Superintendent of Lee's Summit Reorganized School District R-7 from 1984 to June 1988 at ¶¶ 3, 11; Affidavit of Marvin Kirby, Counselor in Division 2, Lee's Summit High School at ¶ 4

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[7] The parties did not submit a copy of this policy.

("if a resident was not within the district, I informed the parents that their children would not be enrolled unless they owned property in the district"); Affidavit of Gail Williams, Acting Superintendent of Lee's Summit R-7 School District at ¶¶ 2, 12 ("based on my understanding of the circumstances of each black KCMSD applicant, they were denied admission because they did not come within the district's nonresident admission policy and practices"). Twenty-three nonresident students are attending LSRSD schools during the current school year based on their parents' property ownership; two nonresident property owners are paying tuition to the LSRSD school district and twenty-one nonresident homeowners are paying tuition to the district while awaiting the completion of a home under construction or waiting for a contract on a home to close. Williams Affidavit ¶ 6.[8] While the district knows that two of these families are black, it is unsure of the race of all the students. August 17, 1988 Letter to Arthur Benson from Kirk May, Appendix, Exhibit 17 at 3. In addition, thirty-four nonresident students whose parents are not property owners are

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[8] Lee's Summit generally does not accept special education students from other school districts. In the past few years, however, one child who was classified as having a behavioral disorder remained in the district after the child's family moved to Pleasant Hill School District at midyear. The child was allowed to complete the last four months of the school year as a tuition paying student at Lee's Summit under the district's nonresident policy allowing students to complete the school year in the district. Also, one special education student, who was a ward of the state, attended the school district for fifteen days pursuant to an arrangement with the Kansas City Regional Center which paid the child's tuition.

attending school in the district for various reasons, each of which is articulated in the policy. One of these students is black and the others are white or of unknown racial background. *Id.* at 1-2.

B. North Kansas City Nonresident Policy

Like LSRSD, the North Kansas City School District has a written policy regarding the acceptance of nonresident students. The district admits nonresident students only under one of the following circumstances: (1) the student is enrolled in a special education program, although resident students have priority, and the home district pays the student's tuition and provides transportation, (2) a student who legally resided within the NKCSD "during the school year" may continue to attend school until the end of the year if his or her family moves from the district, provided that tuition is paid and transportation is provided for the student, (3) orphans, children with only one living parent, and children whose parents do not contribute to their support may attend a school within the district without paying tuition if they have established a permanent or temporary home within the district, or (4) a nonresident student who has a parent who pays a school tax based upon ownership of property within the district may attend school within the NKCSD and receive a credit for tuition on the amount paid in the tax. Appendix, Exhibit 9C.

The NKCSD has admitted a total of ten nonresident students under this policy in the years between 1984-85 and 1987-88.[9] Appendix, Exhibit 22. Eight of these

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[9] Several of these students were enrolled in NKCSD schools for more than one year.

students were special education students whose tuition was paid by the Park Hill School District. One of the students was allowed to finish her senior year at Winnetonka High School after her parents moved from the district, and the remaining student had parents who owned property and paid taxes within the district. *Id.* All of these students are white. *Id.*

C. Independence Nonresident Policy

The Independence School District (ISD) has a policy which provides that nonresident students will be permitted to attend ISD schools if they qualify for admission pursuant to Mo.Ann.Stat. §§ 167.151(2) and (3) (the provisions relating to orphans and individuals entitled to a tax credit for the amount of property tax paid within the district), if they are exchange students under the sponsorship of the American Field Services, or if they are between the ages of six and twenty, who are temporarily within the district for the purpose of attending school, and their admission has been approved by the Office of Pupil Personnel and their tuition has been paid. Appendix, Exhibit 9A. In addition to the exceptions contained within the written policy, the ISD occasionally accepts students with behavioral disorders or orthopedic handicaps with the authorization of the Independence Board of Education. Under this program the sending school district conducts a diagnostic review of the student, which ISD reviews prior to accepting the student.[10] ISD

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[10] ISD suggests in its memorandum opposing plaintiffs' motion for a preliminary injunction that its acceptance of

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Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 3-4.

The ISD has accepted twenty-three students under section 167.15 (3), the property tax provision, in the school years between 1984-85 and 1987-88. Appendix, Exhibit 23. Twenty-one of these students are white, none are black and two are members of other minority groups. The school district has accepted three students in each of the last two years under section 167.151(2), the provision relating to orphan children. These students all resided on Drumm Farm, a private facility located within the Independence School District which houses children from broken homes. Drumm Farm is located within the boundaries of the ISD. *Id.* All of these students are white. The Independence School District has enrolled approximately 100 special education students between the 1984-85 and 1988-89 school years.[11] *Id.* Of these 100 students, three are black and four are members of other minority groups. The information provided by the parties does not state if any minority children applied to the ISD for special education programs and were denied admission.

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special education students falls under the district's written policy. The written policy provides only for admission of orphans, students whose parents pay taxes on property within the district, American Field Services Students and students who are residents of other countries and are only temporarily within the district. The court is unsure of the basis for ISD's statement that the written policy provides for the acceptance of nonresident, special education students.

[11] The information for 1988-89 is a projection.

II. *Summary Judgment Standard*

Each of the SSDs has filed a motion to dismiss for failure to state a claim and a motion for summary judgment. Because the motions to dismiss are supplemented with affidavits and other materials, this court will treat them as additional motions for summary judgment under Fed.R.Civ.P. 12(b) which provides that motions to dismiss for failure to state a claim that include matters outside the pleadings will be treated as motions for summary judgment. *See, e.g., Carter v. Stanton,* 405 U.S. 669, 671, 92 S.Ct. 1232, 1234, 31 L.Ed.2d 569 (1972) (when motion to dismiss for failure to state a claim included matters outside of pleadings, court was required to treat it as a motion for summary judgment); *Abramson v. Mitchell,* 459 F.2d 955, 957 (8th Cir.1972) ("Where matters outside the pleadings must be considered, the court is required by Rule 12(b) and (c) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56."). Thus, in reviewing defendants' various motions this court must consider whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

In making this determination the court is guided by the Supreme Court's reminder that summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*

Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.Proc. 1). Thus,

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id.

The Supreme Court has explained that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (citations omitted). *See also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) ("When the moving party has carried its burden of Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*' ") (footnote and citations omitted) (emphasis in original); *Osborn v. E.F. Hutton & Co., Inc.*, 853 F.2d 616, 618 (8th Cir.1988) ("In order to preclude the entry of summary judgment, it is incumbent upon the nonmoving party to make a sufficient showing on every essential element of its case on which it bears the burden of proof."); *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir.1984) (Summary judgment may

"not be granted unless the moving party has established the right to a judgment with such clarity that there is no room for controversy. . . . However, parties opposing summary judgment motions may not rest upon the allegations in their pleadings, the non-movant must resist the motion by setting forth specific facts showing there is a genuine issue of fact for trial.") (citations omitted). It is with this standard in mind that the court reviews the various grounds advanced by defendants in support of their motions for summary judgment.

III. *The Jenkins Litigation*

A. Res Judicata Argument

Defendants first argue that summary judgment should be granted because Judge Clark's decision in *Jenkins* is dispositive on the issues presented in the present case. Specifically, the SSDs argue that they cannot be required to participate in voluntary interdistrict transfer plan because the previous decisions of both Judge Clark and the Eighth Circuit establish that they have no constitutional obligation to remedy the violation of plaintiffs' equal protection rights by the KCMSD and the state of Missouri. In other words, defendants argue that the previous decisions in *Jenkins* are res judicata for purposes of the present case.

Under the doctrine of res judicata "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980). Defendants argue that since the *Jenkins* court ruled against plaintiffs

on the question of whether the SSDs were constitutional violators, and therefore had a duty to participate in a VIT program, the issues resolved in *Jenkins*, cannot "be collaterally attacked and the question or fact once determined must, as between the same parties, be taken as conclusively established and accorded res judicata effect." *Insurance Co. of North America v. Bay*, 784 F.2d 869, 873 (8th Cir.1986). *See also Poe v. John Deere Co.*, 695 F.2d 1103, 1105-06 (8th Cir.1982) (to determine whether res judicata precludes relitigation of an issue a court must look "to whether proof of the same facts will support both actions, or to whether the wrong for which redress is sought is the same in both actions").

The doctrine of res judicata has been applied in school desegregation cases. *See, e.g., Bronson v. Board of Education*, 525 F.2d 344 (6th Cir.1975), *cert. denied sub. nom., Ohio State Board of Education v. Bronson*, 425 U.S. 934, 96 S.Ct. 1665, 48 L.Ed.2d 175 (1976). Plaintiffs in *Bronson* brought suit alleging that the school system of Cincinnati was segregated in violation of the fourteenth amendment to the Constitution. An earlier decision of the Sixth Circuit had affirmed the district court's decision that the segregation was not a result of the actions of Cincinnati school officials. The court noted that the plaintiffs in *Bronson*, like those in the present case, were substantially the same as those in the earlier litigation and that "an application of strict res judicata principles would bar any further litigation between the parties. . . . " *Id.* at 347. As a result the court held that the parties to the *Bronson* case were "foreclosed from 'the relitigation of essential facts or issues which were previously litigated by the parties

(or their privies) and judicially determined.' " *Id.* at 347 (quoting the unpublished opinion of the district court).

Defendants correctly argue that the doctrine of res judicata, or the more narrow doctrine of collateral estoppel,[12] precludes plaintiffs in the present case from arguing that the defendant SSDs are required to participate in a VIT program. That issue was fully litigated in *Jenkins*. Thus, to the extent that plaintiffs argue that the defendant SSDs have violated plaintiffs' constitutional rights at any time prior to the resolution of the *Jenkins* litigation, the defendants' motion for summary judgment must be granted.

B. Plaintiffs' Claims of New Violations

Plaintiffs apparently concede that they are bound by the courts' earlier determination that the SSDs are not constitutional violators. *See* Plaintiffs' Memorandum in Opposition to Individual and Consolidated Motions and Memorandum of Defendants at 1-2 (hereinafter "Plaintiffs' Opposition") (plaintiffs do not "desire to relitigate in the pending litigation any matter resolved against then in *Jenkins v. Missouri* . . . "). Instead, plaintiffs argue that the present lawsuit is premised on the SSDs' post-*Jenkins* refusal to accept minority KCMSD students as nonresident pupils pursuant to plaintiffs' proposed voluntary

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[12] Professor Wright notes that res judicata is the term used to encompass "all of the ways in which one judgment will have a binding effect on another." The term is used to refer to both issues that were never actually litigated, "true res judicata," and issues that were litigated, "collateral estoppel." Wright, *Law of Federal Courts* at 680 (4th Ed.1983).

interdistrict transfer plan.[13] Plaintiffs' argument is premised, in large part, on dicta in the Eighth Circuit's decision affirming Judge Clark's decision in *Jenkins*. As discussed earlier, the Eighth Circuit noted that

> the district court is correct in its holding that such a program cannot be mandatorily imposed upon the record before the court. Whether a refusal of a district to participate in such a voluntary program *may evidence discriminatory intent and thus be an independent basis for further relief and mandatory participation* is an issue that we should not anticipate.

Jenkins, 807 F.2d at 683 n. 30 (emphasis added). Thus, plaintiffs argue that defendants' post-*Jenkins* refusal to admit plaintiffs as nonresident students evidences an entirely new constitutional violation, one that was not litigated in *Jenkins*. As a result, the question before this court is a narrow one: whether the SSDs refused to admit plaintiffs as nonresident students because of their race, in violation of the fourteenth amendment to the United States Constitution or whether the students were refused admission for legitimate, nondiscriminatory reasons.

IV. *Refusal of Plaintiffs' Applications*

A. Lee's Summit Refusal

Plaintiffs argue that LSRSD cannot rely on its nonresident policy as a reason for denying admission to

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[13] Plaintiffs make identical allegations against the defendant State of Missouri, arguing that the state is violating plaintiff's rights to equal protection by refusing to pay for the costs of tuition and transportation to the SSDs.

plaintiffs because the district initially stated that plaintiffs' applications were denied because

> the State of Missouri has taken the position that it is not obligated to pay tuition or transportation costs for these students and that it intends to appeal the Desegregation Monitoring Committee's decision to the contrary. Given the State's position, the district believes that the requests of these parents and guardians is [sic] moot. I should make it clear, however, that Lee's Summit has not made any final decision about its position if the State loses its appeal or if the State's position changes.

July 27, 1988 Letter to Dr. Terry Stewart, Coordinator Department of Elementary and Secondary Education from George E. Feldmiller, counsel for Lee's Summit R-7 School District, Appendix, Exhibit 11. Approximately two weeks later, on August 17, 1988, LSRSD stated that "plaintiffs were denied admission because, to the district's knowledge, they did not come within the district's policy and practice concerning admitting nonresident students." Defendant LSRSD's Response to Plaintiffs' Requests 8-10, Appendix, Exhibit 3 at 2. A similar explanation of the district's decision to deny plaintiff children admission to the district was made on August 26, 1988 by Margaret Piepergerdes, a former LSRSD school board president. In an affidavit Piepergerdes stated that the district's policy is "to accept nonresident students only as required by law, and in the rare situation where a student's family moves out of the district. . . . " Affidavit at ¶2. Plaintiffs argue that the district's inability to provide a consistent reason for the denial of plaintiffs' request to attend school in the LSRSD establishes at least an inference of racial discrimination.

B. North Kansas City Refusal

Plaintiffs make similar allegations in regard to the NKCSD. Like LSRSD, the NKCSD argues that it is entitled to summary judgment because the plaintiff children were refused admission, not because of their race, but because they do not fall under any of the exceptions contained in the district's nonresident student policy. Plaintiffs argue that the NKCSD did not rely on its nonresident policy in its decision to refuse admission to the plaintiff students but, rather, denied plaintiffs' applications based on discriminatory criteria contained in the district's proposal for a voluntary interdistrict transfer program for the 1989/90 school year.

A letter explaining this reasoning was sent to the parents of each plaintiff who applied for admission to the NKCSD. *See* Appendix, Exhibit 11 at 20. This letter was accompanied by a copy of a letter written by George Feldmiller, attorney for NKCSD, listing eleven conditions contained in the district's proposal for 1989/90. These conditions include (1) giving the district sole authority to determine how many students to admit to the voluntary program, (2) requiring the parent of each student accepted for enrollment to sign a pledge that the parent will support the student's activities and will immediately be available for consultation with school officials, (3) the state of Missouri's agreement to provide whatever financial support is necessary to finance the program, (4) the agreement of Kansas school districts to accept KCMSD students on a voluntary basis, (5) giving NKCSD final authority over all issues relating to the voluntary plan, (6) a stipulation that neither the state nor any other group

will take any action which might lead to NKCSD becoming a party to future court proceedings, (7) an agreement that the state, KCMSD and the plaintiff class in *Jenkins* will provide full and unqualified indemnity to the district for any litigation which may result from the district's acceptance of the students, (8) an agreement by all attorneys who represented the plaintiff class or the school district in *Jenkins* to refrain from any future legal proceedings, and (9) an agreement that NKCSD would be fully reimbursed for all fees, lawyers' time and other expenses attributable to the *Jenkins* litigation. July 19, 1988 Letter from George Feldmiller to Dr. Terry Stewart, Appendix, Exhibit 11.

Plaintiffs argue that NKCSD discriminated against plaintiffs by imposing requirements upon the plaintiff class that are not applicable to residents of the district or to other white nonresident students. Thus, plaintiffs conclude that the proposed advanced by the NKCSD for the enrollment of black, KCMSD students is evidence of a new, post-*Jenkins* constitutional violation.

C. Independence Refusal

Finally, plaintiffs argue that the ISD used discriminatory criteria in deciding to refuse admission to the plaintiff class. According to plaintiffs, the ISD did not make any attempt to base its rejection of the plaintiffs on its nonresident policy but, instead, stated that the students were not admitted based on a VIT program which was proposed to the state in a July 26, 1988 letter to Dr. Terry Steward from Norman Humphrey, ISD attorney. Appendix, Exhibit 11 at 26. Under this proposal the state of

Missouri would purchase a site and construct an elementary school within the boundaries of the Independence School District. Half of the students attending this school would be white students from ISD and half would be minority students from KCMSD. In addition, the ISD would participate in the plan only if three other conditions were met: (1) the district would be reimbursed for all attorneys' fees and costs incurred in defending the *Jenkins* litigation, (2) KCMSD and the state of Missouri would agree to indemnify ISD in the event any new litigation arose, and (3) all attorneys who represented the plaintiff class in *Jenkins* would agree not to initiate or participate in any further proceedings against the ISD. *Id.* at 25-26.

Plaintiffs further argue that even if the ISD's decision to refuse to admit the plaintiffs was based on the district's nonresident policy, the district administered the policy in a discriminatory manner. Specifically, plaintiffs argue the ISD nonresident policy has been used to admit white students to special education programs while denying requests of minority students for racially integrative instructional programs. In other words, plaintiffs argue that the ISD admitted white, nonresident students for special education programs while denying similar requests from black students who wished to attend the ISD to receive education for another special purpose, namely integrated education.

V. *Legal Analysis*

In order to prove that defendants discriminated against plaintiffs in denying their applications to attend

the SSDs as nonresident students, plaintiffs must show that the SSDs' decision can "ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). While this "invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another," the mere fact that the KCMSD schools are predominantly black and the SSDs are predominantly white "is not alone violative of the Equal Protection Clause." *Id.* at 242, 240, 96 S.Ct. at 2049, 2048.

While *Davis* is the starting point for any analysis of discriminatory intent, the Supreme Court expanded on the criteria to be used in determining intent in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). In *Arlington Heights* the Supreme Court noted that its holding in *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." *Id.* at 265, 97 S.Ct. at 563. Thus, to determine "whether invidious discriminatory purpose was a motivating factor" in a defendant's action the court must first consider whether the impact of the official action "bears more heavily on one race than another." *Id.* at 266, 97 S.Ct. at 563 (quoting *Washington v. Davis*, 426 U.S. at 242, 96 S.Ct. at 2049). The court realized, however, that only in rare cases will there be direct evidence of a discriminatory purpose and that in most cases the court will have to consider a variety of other factors before deciding whether an action violates the equal protection clause of the fourteenth amendment. Thus, the Supreme Court has directed trial courts to look to the historical

background of the challenged decision, the specific sequence of events leading up to the challenged action, departure from normal procedures, and the legislative or administrative history of the decision. *Id.* at 267, 97 S.Ct. at 564.

In addition to the factors announced in *Davis* and *Arlington Heights*, this court must keep in mind the Supreme Court's more recent admonition that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Discriminatory purpose implies "that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse affects upon an identifiable group." *Id.*

Courts have often used the standards announced above to determine whether school districts have intentionally discriminated against minority children by denying them opportunities for an integrated education. For example, faced with the question of whether schools located within Marion County, but not necessarily within the Indianapolis public school district, should be required to participate in a busing program, the Seventh Circuit held that schools could be required to participate in a substantial interdistrict effort if, on remand, the district court found that the action of the state or its agents "was made with a racially discriminatory purpose." *United States v. Board of School Commissioners*, 573 F.2d 400, 410 (7th Cir.1978), *cert. denied sub nom., School Town of Speedway, Indiana v. Buckley*, 449 U.S. 838, 101 S.Ct. 114, 66 L.Ed.2d 45 (1980). *See also Diaz v. San Jose Unified School*

District, 733 F.2d 660, 662 (9th Cir.1984), *cert. denied*, 471 U.S. 1065, 105 S.Ct. 2140, 85 L.Ed.2d 497 (1985) (plaintiffs seeking to prove that defendants operated a segregated public school system were required "to prove not only that defendants' actions created or maintained racial or ethnic imbalance in the schools, but also that those actions were motivated by segregative intent"); *United States v. Unified School District No. 500*, 610 F.2d 688, 692 (10th Cir.1979) (while "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation" evidence of these consequences is "relevant evidence to prove the ultimate fact, forbidden purpose" in a school desegregation case) (quoting *Keyes v. School District No. 1*, 413 U.S. 189, 198, 93 S.Ct. 2686, 2692, 37 L.Ed.2d 548 (1973)); *United States v. Texas Education Agency*, 564 F.2d 162, 168 (5th Cir.1977), *cert. denied sub nom., Austin Independent School District v. United States*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 879 (1979) (while plaintiffs alleging that school district had adopted policies which had a segregative effect on Mexican-American students were required to prove intent, mere evidence of "disproportionate racial impact of the neutral application of a longstanding neutral policy, by itself, will rarely constitute a constitutional violation").

Taken together, these cases establish that

> [a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'

Little Rock School District v. Pulaski County Special School District No. 1, 778 F.2d 404, 410 (8th Cir.1985), *cert. denied*, 476 U.S. 1186, 106 S.Ct. 2926, 91 L.Ed.2d 554 (1986) (quoting *Columbus Board of Education v. Penick*, 443 U.S. 449, 465, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979)). Thus, in the present case this court must determine whether the record leaves open any question of material fact as to whether the SSDs' nonresident policies had the foreseeable consequence of preventing the plaintiff class from attending the SSDs based on their race.

Evidence does not exist to support a finding that defendants' actions were taken with the intent to deprive plaintiffs of their rights under the fourteenth amendment. Indeed, the voluminous affidavits, letters, discovery responses and other information currently before the court establish that no genuine issue of fact exists on this matter. Quite simply, plaintiffs have not met their burden of demonstrating that they will be able to show that they were treated in a manner different from that of any other nonresident student or that the nonresident policies were used as a pretext to prevent plaintiffs from attending the SSDs because of their race.

Each of the three SSDs had a specific written policy for the admission of nonresident students.[14] Plaintiffs argue that these written policies either were not used by the defendant school districts or were discarded in favor of unwritten policies or new proposals for voluntary interdistrict transfer programs. Initially, the court notes that only the Lee's Summit School District specifically stated that its refusal to admit the plaintiff students was

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[14] *See supra* at 807-09.

based on a reason other than the written nonresident policy.[15] In their various briefs in support of the motions for summary judgment, however, each of the defendant districts noted that it was their policy and practice only to admit nonresident students as provided in the appropriate nonresident policy. Each of the SSDs argues that it treated the members of the plaintiff class the same as any other nonresident student, minority or majority, who attempted to attend school in one of the three districts. Indeed, plaintiffs have not brought forth any evidence that the SSDs routinely, or even occasionally, admitted white nonresident students who did not fall under one of the written exceptions.

Even assuming, arguendo, that the defendants relied on some reason other than a nonresident student policy in denying the plaintiffs' applications to the SSDs, plaintiffs have failed to illustrate an issue of material fact which could save them from the entry of summary judgment. Plaintiffs argue that the reliance of both the LSRSD and the NKCSD on proposed voluntary transfer plans shows an intent to discriminate against the plaintiffs by imposing conditions on black, nonresident students that were not, and are not, imposed upon resident students.

While this argument initially sounds compelling, it cannot withstand scrutiny upon closer examination. First, the conditions contained in both the ISD's and the NKCSD's voluntary plans are merely preliminary. When plaintiffs were notified of these conditions, they were also

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[15] *See supra* at 812 explaining that LSRSD initially refused to admit the plaintiff students because they were unsure as to whether the state would fund the program.

told that the plans were not final.[16] The NKCSD proposal specifically stated that the district had not yet finalized plans for its 1989-90 voluntary interdistrict transfer program. In addition, the letter written to parents of the plaintiff students specifically stated that the conditions listed were part of a proposal for the following school year and that the students would not be permitted to attend school in the district under a voluntary plan during the 1988-89 school year. In other words, those plaintiffs who attempted to enroll in the NKCSD were not told that they were denied admission because they did not meet any of the eleven conditions contained in the NKCSD proposal. Rather, they were told that these criteria were part of a proposal for the 1989-90 school year.[17]

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[16] Since that time, the Independence School District has notified the court of a new plan for voluntary interdistrict transfers. On November 16, 1988 Norman Humphrey, counsel for the ISD, forwarded a copy of the district's proposed voluntary interdistrict transfer plan to the court. This plan proposes to create a school in the Independence School District that would be funded by the state of Missouri pursuant to Judge Clark's desegregation order. The school would be attended by 210 white students from the ISD and 210 black students from KCMSD. All students would be considered "transfer students" for funding purposes. The plan provides that KCMSD students graduating from this school would have the option of enrolling in the ISD secondary school system. Although the court has not extensively reviewed the exhaustive proposal, it does not appear that this plan contains conditions, such as complete reimbursement for attorneys' fees incurred in *Jenkins*, to which plaintiffs objected in the earlier proposal.

[17] The court notes, without deciding, that it is questionable whether these eleven criteria would qualify as an

(Continued on following page)

If the proposal had actually gone into effect when plaintiffs were denied admission, the plaintiffs might be able to prove that the conditions were merely a pretext for keeping minority students out of the NKCSD. The court is unable to find, however, that a mere proposal can serve as the basis for a finding of invidious discrimination. Such a result would almost certainly reduce the willingness of any school district to participate in such a program since liability for constitutional violations could be premised on each idea that ultimately gives rise to the final plan.

(Continued from previous page)

appropriate VIT under Judge Clark's remedy order in *Jenkins*. In that order Judge Clark noted that in any interdistrict plan

> [t]he receiving district will agree not to reject individual applicants unless there is a history of serious disciplinary problems, will allow the transfer student to remain in attendance until such student graduates or returns to the student's home district, as long as that student satisfies all academic and other standards applicable to all resident students, *will treat interdistrict transfer students in the same manner, in all regards, as they treat resident students*, and will permit KCMSD to recruit applicants for interdistrict transfers within its district.

Several of the conditions stated in NKCSD's proposal for the 1989-90 school year appear to treat KCMSD students differently from the minority KCMSD students, in violation of Judge Clark's order and perhaps, in violation of the equal protection clause. Thus, it is questionable whether the state would be required to fund this program, another condition set out by NKCSD. In any event, the proposal was not the basis for the district's denial of plaintiffs' request to attend these schools on a voluntary basis.

In any event, plaintiffs could not have been denied admission to the SSDs under plans that had not been finalized. Although the court is unsure whether the eleven conditions contained within the NKCSD proposal fall within the guidelines announced by Judge Clark in *Jenkins*, or whether they would pass constitutional muster standing on their own, that question is not currently before the court.

In other words, since plaintiffs have failed to show that they were denied admission under the new plan they have failed to "demonstrate sufficient ripeness to establish a concrete case or controversy." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 579, 105 S.Ct. 3325, 3332, 87 L.Ed.2d 409 (1985). The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Id.* at 580, 105 S.Ct. at 3333 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967)). Put in slightly different terms, the doctrine operates so that

> [e]ven when the court concedely possesses jurisdiction to decide a question of constitutional law, it will decline to do so if a less fundamental ground will suffice, or if the issue is not squarely presented in an adversary context, *or if it can be said that the issue is so premature that the court would have to speculate as to the presence of a real injury.*

Meadows of West Memphis v. City of West Memphis, Arkansas, 800 F.2d 212, 214 (8th Cir.1986) (emphasis added). *See also Wilson v. Robinson*, 668 F.2d 380, 384 (8th Cir.1981), *overruled on other grounds, Stow v. Cochran*, 819 F.2d 864 (8th Cir.1987) ("The ripeness doctrine functions

to ensure that issues are presented with the clarity and concreteness that accompanies the threat of actual harm or loss."). Because the NKCSD plan is merely in its planning stages, this court cannot speculate as to whether the conditions listed in the proposal discriminate against black students from the KCMSD.

Plaintiffs' argument that the nonresident policies were used as a pretext to deny plaintiffs' admission is no more persuasive. Plaintiffs argue that the fact that several SSDs accept white, nonresident, "special education" students is further proof that they intend to discriminate against black KCMSD students who seek the benefits of a different type of special program, an integrated education.

This argument is simply without merit. First, plaintiffs have failed to establish any evidence that black students are treated any differently than white students under any aspect of the SSDs' respective nonresident plans nor have they established that blacks are excluded from the SSDs' special education program, a factor that would certainly be probative on the issue of intent. In addition, the evidence in the record clearly establishes that white nonresident students in the same position as plaintiffs would also have been denied admission to the SSDs. *See Tasby v. Estes*, 412 F.Supp. 1185 (N.D.Texas 1975), *aff'd*, 572 F.2d 1010 (5th Cir.1978), *cert. granted sub nom., Estes v. Metropolitan Branches of Dallas NAACP*, 440 U.S. 906, 99 S.Ct. 1212, 59 L.Ed.2d 454 (1979), *cert. dismissed*, 444 U.S. 437, 100 S.Ct. 716, 62 L.Ed.2d 626 (1980) (nonresident policy of school district that resulted in whites, but not blacks, being allowed to transfer into suburban school district "had de minimus to no effect

upon the racial composition of the [Dallas Independent School District]" and, therefore, no constitutional violation was found). More importantly, however, the SSDs have the right to decide whether they wish to participate in a voluntary interdistrict transfer program. To rule otherwise would emasculate the meaning of the word "voluntary."

The Supreme Court has consistently stated that it will not interfere with local control over education programs absent a showing that the discretion of local school officials is being used in an unconstitutional manner. *See, e.g., Martinez v. Bynum*, 461 U.S. 321, 329, 103 S.Ct. 1838, 1943, 75 L.Ed.2d 879 (1983) (local school boards have the right to impose residence requirements because "provision of primary and secondary education . . . is one of the most important functions of local governments"); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 482, 102 S.Ct. 3187, 3201, 73 L.Ed.2d 896 (1982) ("If local school boards operating under a similar statutory structure are considered separate entities for purposes of constitutional adjudication when they made segregative assignment decisions, it is difficult to see why a different analysis should apply when a local board's *desegregative* policy is at issue.") (emphasis in original); *Milliken*, 418 U.S. at 741-42, 94 S.Ct. at 3125-26 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

Plaintiffs in the instant case have not shown even the slightest indication that the SSDs were improperly exercising discretion in refusing to admit plaintiffs as nonresident students. Indeed, the opposite is more likely to be true since at least two of the three districts were actually developing VIT programs at the time plaintiffs attempted to gain admission to the SSDs. Thus, considering the historical involvement of the SSDs in the *Jenkins* litigation and the fact that the SSDs were working with the state to develop VIT programs, both of which are factors this court must consider under *Arlington Heights*, no finding of discriminatory intent is possible.

VI. *The State Defendants*

In their motion to dismiss or, in the alternative, for judgment on the pleadings, the state defendants argue that they have not committed any acts of discrimination since they did not deny the plaintiffs' applications to the SSDs. In addition, the state defendants argue that they have no obligation to fund the transfers proposed by plaintiffs since Judge Clark's order in *Jenkins* directed the state, and not the plaintiffs, to implement VIT programs.[18] Plaintiffs have filed a motion for partial summary judgment against the state defendants on the issue of the state's duty to pay the transportation and tuition costs of any KCMSD student given permission to enroll as a nonresident student at one of the defendant SSDs. Thus, the court will treat the issue of the state's duty to

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[18] *See supra* at n. 3.

fund the programs as arising under cross motions for summary judgment.

Plaintiffs argue that the state defendants have violated their constitutional rights because they have failed to take affirmative steps, as ordered by Judge Clark in *Jenkins*, to remedy earlier constitutional violations. *See Reitman v. Mulkey*, 387 U.S. 369, 375, 87 S.Ct. 1627, 1631, 18 L.Ed.2d 830 (1967) ("prohibited state involvement could be found 'even where the state can be charged with only encouraging,' rather than commanding discrimination") (citation not given). More specifically, plaintiffs argue that by failing to fund the transportation and tuition costs of plaintiffs who are accepted as nonresident students at one of the three defendant SSDs, the state defendants have abrogated their duty under Judge Clark's remedy order in *Jenkins* and, therefore, committed a new constitutional violation.

Like the constitutionality of the preliminary proposals discussed earlier, the issue of the state's duty to fund the plaintiffs' plan is not a "case or controversy" as required by Article III. As plaintiffs themselves admit, Judge Clark determined in *Jenkins* that the state has a duty to fund the education of "any and all KCMSD black school children who desire to attend school in the suburban school districts *and are admitted* by those districts in a racially nondiscriminatory manner." Plaintiffs' Opposition at 6 (emphasis added). Thus, even if the case were ripe for review the issue is moot since no students were admitted to any of the three defendant SSDs for the 1988-89 school year.

Furthermore, this court does not have jurisdiction to decide whether the state of Missouri has a duty to fund a voluntary interdistrict program suggested by plaintiffs. The requirement that the state funds VIT programs stems directly from Judge Clark's remedial order and it is Judge Clark, not this court, who must determine whether a particular program falls within the scope of his remedy order.[19]

Plaintiffs have not, however, proven any new violation by the state of Missouri. Their main allegation appears to be that the state has not acted with due diligence in establishing voluntary interdistrict transfer programs. While the fact that the state has not yet successfully established a VIT program may be indicative of discriminatory intent, it is only one factor the court must consider. Although no program has yet been established, the state has been working with the school districts to establish such a program. Judge Clark addressed this issue in his January 7, 1988 order, which addressed the plaintiffs' argument that the state defendants were not seriously committed to arranging a VIT plan in accordance with the *Jenkins* remedy order. In that order

> [t]he Court acknowledge[d] that progress in achieving a voluntary interdistrict program has been slow, but [found] that it is *not because of a*

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[19] *See, supra* at n. 3. This is not to say, however, that this court has no jurisdiction over the state in the present case, as argued by plaintiffs in their earlier motion to transfer. Insofar as plaintiffs allege that some new violation by the state occurred during the time period giving rise to the facts of this case, this court does have jurisdiction.

> *lack of effort by the state defendants*. On the contrary, the state contends that it has engaged and is currently engaged in discussions with the school districts in the Kansas City, Missouri area. Furthermore, the newly created voluntary interdistrict transfer subcommittee of the Desegregation Monitoring Committee is fully committed to assisting the State and the order parties in developing a voluntary interdistrict transfer program. The court [found] that this subcommittee, not an order from the court is the most effective means in achieving a successful voluntary interdistrict transfer program. Therefore, the plaintiffs' motion to require the State of Missouri to engage in further efforts and activities towards achieving a voluntary interdistrict program will be denied.

Jenkins, January 7, 1988 Order at 14-15 (emphasis added).

This court believes that Judge Clark's determination that the state is actively engaging in efforts to establish a voluntary interdistrict transfer program is compelling, if not binding, evidence that the plaintiffs have failed to establish a genuine issue as to whether the state has discriminated against plaintiffs by frustrating the establishment of VIT programs. While the state has questioned its responsibility to finance the tuition and transportation of students in a program proposed by plaintiffs, rather than coordinated by the state, the court cannot find that such a challenge is evidence of discrimination against plaintiffs in the present case. The state has a right to challenge its interpretation of Judge Clark's remedy order in *Jenkins* and has done so. This challenge, without more, does not prove discriminatory intent.

VII. *Sanctions*

The defendant school districts have filed a motion for sanctions under Fed.R.Civ.P. 11. This motion is joined by the state defendants.[20] Each of the defendants asks that plaintiffs be required to pay for all costs[21] incurred in defending this suit for two reasons: (1) because plaintiffs refiled their motion to transfer the case to Judge Clark in this court after Judge Barlett had denied an identical motion only a few days earlier and (2) because plaintiffs' motion for a preliminary injunction must be considered as frivolous in view of the fact that plaintiffs' attorney stated in a hearing before Judge Bartlett that the plaintiffs would dismiss their case if they were not awarded relief before September 6, 1988, the beginning of the school year.

Fed.R.Civ.P. 11 requires that all pleadings be signed by an attorney or by the party if the party is proceeding *pro se*. This signature

> constitutes a certificate by the signer that the signer has read the pleading, motion, or other

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[20] The state defendants orally joined in this motion at the hearing on August 18, 1988. Transcript of August 18, 1988 Hearing at 31. The state did not, however, file a written motion for sanctions.

[21] The SSD defendants' motion actually seeks a variety of sanctions, including dismissal of the case. In view of the fact that the court has granted defendants' various motions for summary judgment, it need not consider dismissal as a possible sanction under Rule 11. As a result, the court's discussion of the Rule 11 issue will consider only defendants' requests for costs and attorneys' fees.

> paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the costs of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed.R.Civ.P. 11. Thus, defendants in the present case argue that plaintiffs should not have filed the lawsuit itself, but especially the second motion to transfer and the motion for a preliminary injunction, because these pleadings were not well grounded in fact or by existing law and they were filed in order to harass the suburban school districts which were, at the time the lawsuit was filed, preparing for the start of the 1988-89 school year.

In determining whether an award of sanctions is appropriate in the instant case this court must consider "whether the person who signed the pleading conducted a reasonable inquiry into the facts and law supporting the pleading." *O'Connell v. Champion International Corp.*, 812 F.2d 393, 395 (8th Cir.1987). *Accord Thomas v. Capital Secu-*

rity Services, 836 F.2d 866, 873 (5th Cir.1988) ("Rule 11 compliance is now measured by an objective, not subjective, standard of reasonableness under the circumstances."); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 124 (8th Cir.1987) (the determination of whether an attorney made a reasonable inquiry into the facts of a case before signing the paper or pleading is based on objective reasonableness); *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 557 (9th Cir.1986), *cert. denied sub nom., Barton v. E.F. Hutton & Co., Inc.*, ___ U.S. ___, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987) (Rule 11 violations are not determined by evaluating subjective bad faith but "[r]ather an attorney violates Rule 11 whenever he signs a pleading, motion, or other paper without having conducted a *reasonable inquiry* into whether his paper is frivolous, legally unreasonable, or without factual foundation.") (emphasis in original).

This court must focus upon the time when plaintiffs filed their lawsuit and cannot use hindsight to determine whether there was a reasonable basis for the suit or whether it was brought to harass defendants. *Thomas*, 836 F.2d at 874. *See also Burull v. First National Bank of Minneapolis*, 831 F.2d 788, 789 (8th Cir.1987), *cert. denied sub nom., Arthur Young & Co. v. Burull*, ___ U.S. ___, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988) ("Rule 11 directs sanctions 'only when the "pleading, motion or other paper" itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous.' ") (quoting *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir.1986)); *Fisher v. CPC International, Inc.* 591 F.Supp. 228, 237 (W.D. Mo. 1984) (Rule 11 sanctions are appropriate when "action had no reasonable basis in law or fact

from the beginning."). Although it is helpful for a party or the court to identify specific pleadings which they find to be the subject of Rule 11 sanctions, there is no absolute requirement that specific papers be identified if the conduct of the litigation as a whole is appropriate for sanctions. *Lupo v. R. Rowland & Co.*, 857 F.2d 482, 485-86 (8th Cir.1988).

The court finds that Rule 11 sanctions are appropriate in this case.[22] First, the court notes that plaintiffs filed a motion to transfer the case to Judge Clark after Judge Bartlett recused himself and the case was transferred to this division. This motion was identical to one denied by Judge Bartlett only days before. Plaintiffs presented no new facts or evidence in support of the motion for transfer but, apparently, were attempting to circumvent Judge Bartlett's ruling and appear before a judge who they believed might be more favorable to their cause. Thus, this court will direct plaintiffs' attorney to pay the costs incurred by defendants in responding to the second motion to transfer.

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[22] The court notes that an award of fees may also be appropriate under 28 U.S.C. § 1927 which provides that

> any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

As this decision notes, *infra*, the timing of the motion for preliminary injunction, and the statements of plaintiff's counsel to Judge Bartlett, appear to be the type of conduct to which section 1927 is directed.

The decision whether to assess costs against plaintiffs' attorney for filing the lawsuit generally, and the motion for a preliminary injunction specifically, is more difficult. After a careful consideration of the facts, the court finds that plaintiffs' attorney should be required to pay defendants' costs in preparing for the preliminary injunction hearing and in defending against the lawsuit generally. While the court acknowledges that footnote 30 of the Eighth Circuit's decision in *Jenkins* opened the door to plaintiffs' suit, plaintiffs have not presented any evidence to suggest that this specific lawsuit had any basis in fact or in law. Plaintiffs began communication with the SSDs in May 1988 regarding the possibility of plaintiffs enrolling in the defendant SSDs for the 1988-89 school year. Defendants' attorneys responded to each of the letters written to them by plaintiffs' counsel,[23] and told plaintiffs' attorney that the districts were considering voluntary interdistrict transfers but had not yet reached any definite conclusions about whether to participate in a program.[24] Thus, well before plaintiffs filed suit in the

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[23] In some cases, letters were written by members of the KCMSD school board to members of the school boards of the SSDs.

[24] For example, on May 27, 1988 George Feldmiller, attorney for the defendant SSDs, wrote a letter to Arthur Benson, plaintiffs' attorney, stating that

> "the districts are quite busy now with end-of-year school matters. Nevertheless, the districts will discuss the overall subject over the next few weeks. I believe at least one of the districts has some investigation activities scheduled for mid-July." On June 20, 1988 Feldmiller responded to Benson's June 16, 1988

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instant case they were aware that the suburban school districts were considering, and in some cases formulating, voluntary interdistrict transfer plans. Evidence of consideration of these plans should have been considered by plaintiffs' attorney before he filed suit alleging that defendants were intentionally discriminating against plaintiffs. Similarly, plaintiffs' attorney should not have filed suit merely because he believed drafts of proposed plans were constitutionally infirm.

The court is also persuaded by defendants' argument that plaintiffs' counsel, when appearing before Judge Bartlett to determine a date for the preliminary injunction hearing, unequivocally stated that plaintiffs would be inclined to dismiss the case if a permanent injunction was

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> letter soliciting suggestions about the process for instituting a voluntary interdistrict transfer plan. In this letter Feldmiller stated that "none of the districts has made a final decision whether to permit enrollment of such students or the qualifications which would be required if any district decides to accept such applicants. Each of the districts is currently giving every consideration to a voluntary program."

In addition, letters from Feldmiller to Dr. Terry Stewart, the coordinator of the State Department of Elementary and Secondary Education, illustrate that both the NKCSD and the ISD were in the process of formulating proposals for the 1989-90 school year. *See* July 19, 1988 letter to Dr. Terry Stewart from George Feldmiller and July 22, 1988 letter from Norman Humphrey, Jr. to Mr. Terry Stewart.

not issued during the beginning of September.[25] The court finds it incongruous that plaintiffs would request

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[25] The relevant portion of the transcript states:

THE COURT: Well, I didn't really take him literally on that, Mr. May. Maybe I should have, but I gave him the benefit of the doubt that he was, that was the relief he wants, but if he would end up getting relief for, at some later date, I don't think he would probably turn it down. Am I wrong, Mr. Benson?

MR. BENSON: Well, you may be. I could foresee a situation in which, if a preliminary injunction were entered and it were taken to the 8th Circuit by the defendants and a decision was not rendered until the 8th of September, then I am not literally drawing an imaginal line of the 6th of September, but *there is a date very soon in September where the relief would not be appropriate. My clients would not want the relief at that time.*

It would do them – it would be counter-productive to their education to be admitted at some significant period of time into the school year. And it would be disruptive to the schools in a way that will affect their education. So there is a date very soon after the [sic] September 6th that would moot their request for relief. It is a date that is close enough so that I can conceive no circumstances under which we would want to have a hearing for a permanent injunction at some later time. I can see no reason not to consolidate the two.

THE COURT: I can't believe you are taking that position. Are you taking the position that if, for one reason or another, I would determine that you don't get a preliminary injunction but at some later

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both a preliminary and permanent injunction and then state, on the record, that they would dismiss their suit

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hearing I would determine you are entitled to the relief you request but beginning in the next school year, you would dismiss this case rather than seek that?

MR. BENSON: Well, no, because *we are not asking for relief in the next school year.*

THE COURT: I know you are not asking for relief in the next school year. I think I know what you are trying to do. You are trying to make this a clear cut irreparable harm matter. I think you better rethink that. I think you are jeopardizing the interest of your clients. You didn't bring this case, Mr. Benson, until August at [sic] 10th.

MR. BENSON: They didn't – Your Honor, they didn't turn us down until the end of July.

THE COURT: If they were doing what you suggest they were doing, it seems to me you knew about it earlier. But – in any event, if that is your position, I will take you literally and will reflect on this record that if relief is not afforded your clients to enter school by September the 6th *that the case can be dismissed because you don't want any other ruling;* is that correct?

MR. BENSON: That is very close to what I am saying, Your Honor.

THE COURT: Okay, that is what it will reflect.

MR. BENSON: I am saying –

THE COURT: I will take you literally.

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entirely if the two hearings were not consolidated because they wanted the relief within two or three weeks

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MR. BENSON: Your Honor. I am saying because we want this litigation concluded as badly as the defendants do at an earlier date, if we are not entitled under either of our theories to have our kids put in these schools, then we need to find, we have to address the question of their opportunities for an integrated education in some other manner. It serves us all to put this litigation behind us. That is why we want to have the permanent injunction heard at the same time with the preliminary injunction. We are prepared to do that.

THE COURT: It seems to me you are putting the cart before the horse. You are putting some kind of idea about accelerated litigation ahead of the long-term interests of your clients. But that is up to you. You represent them, I don't, and I will take you literally at what you say; if you don't get the relief that you request in this court, this case will be dismissed. And it will be dismissed if you don't get the admission by September 6th, it will be dismissed. I just don't understand that.

MR. BENSON: As I said, I am not drawing a literally imaginal line on September 6th. But if there were circumstances to which the decision of the court was delayed and it came out on the 7th – that is not what I am saying, if that is what the court is interpreting.

THE COURT: That is not what I am saying. I am saying, you don't want relief if you don't get it on September 6th, 7th, 8th or 9th you don't want relief.

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of the time the suit was filed or not at all. The court is especially suspect of this procedural posturing given the fact that plaintiffs decided to withdraw their motion for a preliminary injunction only an hour before the hearing was scheduled to begin.

At the time plaintiffs withdrew their motion for a preliminary injunction they did not offer to dismiss the rest of the case, but rather, asked that the court simply consider the motion for a permanent injunction at a later date, after additional discovery had taken place.[26] At the hearing held on August 18 in place of the preliminary injunction hearing, Benson stated that he had a "full understanding" the court could not schedule a permanent injunction hearing "anytime soon." Transcript of August 18, 1988 Hearing at 46. Not only does the court find that these statements are inconsistent, it also cannot

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> MR. BENSON: To be absolutely positive in the statement and declaratory, *we are not asking for relief in the second semester of the coming school year or the subsequent school year.* That is not part of the lawsuit or part of the relief. *We would dismiss, if that were the only alternative.*

Transcript of August 12, 1988 hearing at 53-56 (emphasis added).

[26] In the August 18 hearing before this court Benson argued that his comments before Judge Bartlett were made because "[t]he only thing we wanted was a conjunction of the permanent injunction and preliminary injunction hearings at the same time. . . . " Transcript August 18, 1988 Hearing at 14. Even a cursory reading of the August 12 transcript belies this assertion since Benson stated, on several occasions, that his clients wanted no relief after the beginning of the school year.

help but wonder whether counsel made these decisions with the best interests of his clients in mind. As a result, the court will order plaintiffs' attorney to pay the reasonable costs incurred by defendants in preparing for the preliminary injunction hearing and in preparing their dispositive motions. Defendants' attorneys are directed to file affidavits listing costs accrued and hours spent, along with the applicable hourly rates, defending against this case. Plaintiffs will then be given an opportunity to respond to these affidavits. Accordingly, it is

ORDERED that the motion of Lee's Summit Revised School District for summary judgment is granted. It is further

ORDERED that the motion of Lee's Summit Revised School District for dismissal is denied as moot. It is further

ORDERED that the motion of the North Kansas City School District for summary judgment is granted. It is further

ORDERED that the motion of the Independence School District for summary judgment is granted. It is further

ORDERED that the alternative motion of the Independence School District to dismiss is denied as moot. It is further

ORDERED that the motion for summary judgment by the state defendants is granted. It is further

ORDERED that the plaintiffs' motion for partial summary judgment against the state defendants is denied. It is further

ORDERED the defendants' motion for sanctions pursuant to Rule 11 is granted. It is further

ORDERED that defendants file affidavits detailing their costs and the hours spent defending this suit within twenty days of the date of this order. It is further

ORDERED that plaintiffs respond to defendants' affidavits within twenty days of their file-stamp date.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

January 11, 1989

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No. 90-391

Supreme Court, U.S.
FILED
SEP 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT R-7, SCHOOL DISTRICT OF THE CITY OF INDEPENDENCE, NORTH KANSAS CITY SCHOOL DISTRICT, MEMBERS OF THEIR RESPECTIVE BOARDS OF EDUCATION AND SUPERINTENDENTS, et al.,

Petitioners,

v.

JENNIFER T. NAYLOR, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF RESPONDENTS NAYLOR, et al., IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals' reversal and remand for trial of the district court's grant of summary judgment warrants review by this Court.

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No. 90-391

In The

Supreme Court of the United States

October Term, 1990

LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT R-7, SCHOOL DISTRICT OF THE CITY OF INDEPENDENCE, NORTH KANSAS CITY SCHOOL DISTRICT, MEMBERS OF THEIR RESPECTIVE BOARDS OF EDUCATION AND SUPERINTENDENTS, et al.,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS NAYLOR, et al., IN OPPOSITION TO CERTIORARI

COUNTER-STATEMENT OF THE CASE

The single count complaint in this case was filed on August 9, 1988 by a class of 134 black public school students against three school districts, the petitioners, alleging that in 1988 those districts violated the Fourteenth Amendment by refusing them admittance because

of their race. Joint Appendix at 93. The students had earlier sought, and been denied, admission as tuition-paid, nonresident students.[1] The students also sought, in this complaint and in a parallel motion in *Jenkins*, declaratory and injunctive relief against the State of Missouri defendants for their refusal to fund the students' transfers.[2]

The district court granted motions for summary judgment dismissing the complaint[3] and the students appealed. The court of appeals reversed "because a material factual dispute remains respecting the suburban school districts' racial motivation in refusing to accept black transfer students from the KCMSD." *Jenkins v. Missouri*, 904 F.2d 415, 419 (8th Cir. 1990).[4] The case was remanded for further proceedings. *Id.* at 420.

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[1] As black residents of the School District of Kansas City, Missouri these students were the intended beneficiaries of a voluntary interdistrict transfer proposal that had been ordered in *Jenkins v. Missouri*, 639 F. Supp. 19, 39 (W.D. Mo. 1985), *aff'd*, *Jenkins v. Missouri*, 807 F.2d 657, 684 (8th Cir. 1986), *cert. denied* 484 U.S. 816 (1987), and by which the State of Missouri defendants were to provide transportation and pay the tuition to surrounding school districts for black students from Kansas City.

[2] The State defendants did not seek certiorari from the judgment of the court of appeals and are not now before this Court.

[3] *Naylor v. Lee's Summit Reorg. Sch. Dist. R-7*, 703 F. Supp. 803 (W.D. Mo. 1989).

[4] This case is reported under the *Jenkins* caption because the court of appeals decided parallel issues in *Jenkins* and

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REASONS FOR DENYING THE WRIT

Summary of Argument

This Court should deny the petition in this case for two reasons. First, there is nothing in the facts of the case or the proceedings below that remotely gives rise to the issues in the petitioners' questions presented. The petition presents questions that the facts and circumstances of the case simply do not present. The only action the court of appeals took with respect to the petitioners in *Naylor* was to reverse the grant of summary judgment in their favor, as required by some factual errors committed by the district court,[5] and to remand the case to that court to determine whether or not the evidence supports respondents' claims of intentional discrimination. No factual issues were resolved against petitioners. Nor were any legal issues resolved against the petitioners except to say that the evidence proffered by respondents, if proven, might establish intentional racial discrimination. Consequently, no court has held that any of the petitioners has violated the Fourteenth Amendment, and no court has coerced any school district to participate in any voluntary

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Naylor in a single opinion. Petitioners are parties only to the *Naylor* case. No aspect of the *Jenkins* case is now before this Court.

[5] The court of appeals found a "genuine issue of material fact." *Jenkins v. Missouri*, at 420. The basis for this finding is explained in the concurrence at 422-424. *See, e.g. Jenkins* at 423 (Gibson, J., concurring) (" . . . the district court erred in viewing the actions of the suburban school districts as merely preliminary proposals which could not serve as the basis for a finding of invidious discrimination.").

interdistrict transfer plan. Instead, the district court in *Naylor* has been instructed to try the case and has been instructed in *Jenkins*, which is not before this Court, to promulgate and implement a voluntary interdistrict transfer proposal for those school districts, and only those districts, that choose to participate.[6]

Second, the Eighth Circuit correctly applied the law in reversing the district court's grant of summary judgment. Explicitly relying upon and routinely applying the summary judgment standards enunciated by this Court in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and the intentional discrimination standards enunciated by this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 42 U.S. 252 (1977), the court of appeals properly concluded that the *Naylor* class has presented genuine issues of material fact. Because the district court failed to apply, or incorrectly applied, summary judgment standards, reversal was proper. No other issue was decided against petitioners; therefore, the writ should be denied.

I. There is nothing in the facts and circumstances of the case that gives rise to questions presented in the petition.

Petitioners have raised two questions before this Court. Because there is nothing in the facts and

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[6] Because this order was part of the *Jenkins* litigation, to which petitioners were not parties, it is not properly before this Court. Petitioners' reliance on the *Jenkins* order is therefore not only incorrect, but also misplaced. Indeed, pursuant to the judgment in *Jenkins* the district court on May 14, 1990 promulgated its proposal, the State solicited participation by school districts, and one – Missouri City – agreed. Minority students from KCMSD are now attending school in Missouri City.

circumstances of the case that gives rise to either question, the writ should be denied.

A. Petitioners have not been found to have violated the Fourteenth Amendment.

Petitioners' first question presented raises the hypothetical question whether a suburban school district ("SSD") that chooses not to participate in a voluntary interdistrict transfer proposal, by that fact alone, violates the Fourteenth Amendment. Thus stated, the question overstates the decision below. No court has found that the petitioners violated the Fourteenth Amendment. Nothing in the decision below even suggests that petitioners have or have not violated respondents' constitutional rights. Rather, the Eighth Circuit remanded the case to the district court for a factual determination of the very question that the petitioners claim has been resolved against them below and now seek to present for review to this Court.

Neither the respondents nor the court below has ever suggested that *any* refusal to participate in a voluntary interdistrict transfer proposal, without more, would be unconstitutional. Even the district court, in granting summary judgment in favor of petitioners, noted the narrowness of the issue raised.

> Thus, plaintiffs argue that defendants' post-*Jenkins* refusal to admit plaintiffs as nonresident students evidences an entirely new constitutional violation, one that was not litigated in *Jenkins*. As a result, the question before this court is a narrow one: whether the SSDs refused to admit plaintiffs as nonresident students

> because of their race, in violation of the fourteenth amendment to the United States Constitution or whether the students were refused admission for legitimate, nondiscriminatory reasons.

Naylor, 703 F. Supp. at 812. No court has even considered the issue that petitioners now claim was resolved against them.

This Court's previous opinions make clear, however, that a *racially based* decision not to allow interdistrict transfers from the KCMSD offends the Fourteenth Amendment. *See Arlington Heights*, 429 U.S. at 267 & n.17 (departure from usual procedures or failure to consider usual factors may be evidence of racial animus that violates the Fourteenth Amendment); *Griffin v. County School Bd.*, 377 U.S. 218, 230-32 (1969) (State can close schools, but not for racially based reasons).

Even the barest examination of the Eighth Circuit's opinion reveals that court's acute awareness that a finding of intent is a prerequisite to Fourteenth Amendment liability. While the *Naylor* class had been denied admission by the SSDs, the court of appeals did not find that this refusal violated the Fourteenth Amendment. Instead, the Court "reverse[d] because a material factual dispute remains respecting the suburban school districts' *racial motivation* in refusing to accept black transfer students from the KCMSD." *Id.* at 420. (emphasis added).

If – as petitioners necessarily contend as a premise for seeking this Court's review – the Eighth Circuit had held that intent is not a requisite to liability for refusing to participate in a voluntary interdistrict transfer plan, the appeals court would have been required to grant

summary judgment to respondents. The Eighth Circuit did not do that. Rather, it correctly remanded to the district court for a trial on the merits of the intent question. Because no court has found that the SSDs' refusal to participate in a voluntary interdistrict transfer proposal offends the Constitution, this case does not in fact present the first question that the petitioners hypothetically present to the Court in their petition.

B. The Eighth Circuit's opinion below does not authorize any court to coerce SSD cooperation in a VIT proposal.

The petition similarly mischaracterizes the decision below in its second question presented. The question posed, "whether a federal court may coerce a local government with no history of racial discrimination to participate" in a voluntary interdistrict transfer program promulgated by a federal court, was neither presented nor addressed in the court below. Rather, the entire focus in the *Naylor* decision below was on identifying the proper procedure for determining whether the petitioner local governments *do* have a history of racial discrimination in regard to their decision to refuse admission to the respondent black applicants.

Further, the Eighth Circuit's entire discussion of the district court's responsibilities in regard to promulgating a voluntary interdistrict transfer proposal occurred in its discussion of the *Jenkins* litigation (which is not before this Court), and imposed obligations exclusively on the State of Missouri (which is not a party to this petition) and not on the SSDs (which are not parties to the *Jenkins*

litigation). Again, the opinion is instructive. After discussing the *Naylor* claims, the Eighth Circuit turned to the separate but parallel *Jenkins* litigation. The court first considered and rejected the district court's opinion that the question of State funding for a voluntary interdistrict transfer proposal was not ripe. *Jenkins*, 904 F.2d at 419. The Court then continued: "Resolution of the issues *presented in Jenkins v. Missouri* requires that the district court, after giving the parties an opportunity to suggest proposals, promptly develop a voluntary interdistrict transfer program to implement the remedy called for in its opinion of July 14, 1985, which we affirmed." *Jenkins*, 904 F.2d at 419 (citation omitted) (emphasis added). The Eighth Circuit could not have been more explicit that the voluntary interdistrict transfer order was part of its opinion in the *Jenkins* litigation. Because the SSDs are not parties to the *Jenkins* litigation, they are not in any way bound by the *Jenkins* order and have no standing or cause to raise the *Jenkins* issues before this Court. ~

In any event, even were the *Jenkins* litigation somehow before this Court, petitioners' second question presented inaccurately portrays the Eighth Circuit's order in that litigation. The record and proceedings below contain no suggestion that the district court is empowered to coerce any district to participate in whatever voluntary interdistrict transfer proposal it promulgates for consideration by any districts that care to consider it. To the contrary, the Eighth Circuit quite explicitly told the district court, in default by the State of its five-year-old obligation to do so, to draw up a voluntary interdistrict transfer proposal "so that school districts *which desire to do so* may participate in the 1990-91 school year." *Jenkins*,

904 F.2d at 419 (emphasis added). The Eighth Circuit, thus, simply ordered the district court to take the place of the State in formulating a voluntary interdistrict transfer proposal and offering it to such districts in the Kansas City area as might be interested.

In sum, *Naylor* involves a prior event (the SSDs' refusal in 1988 to admit to their schools a number of black applicants), and the court of appeals' order that the district court determine whether unconstitutional racial animus interceded in that 1988 event. By contrast, *Jenkins* (which is not even before this Court), involves a future event (the promulgation for 1990 and beyond of a voluntary interdistrict transfer proposal), and the court of appeals' order that the district court present that 1990 – and beyond – proposal to the SSDs, and any other interested districts, for such action or inaction as those districts "desire to [undertake]." By eliding those two quite separate events into a single, hypothetical event of petitioners' imagining, question two presents the court with a request for an advisory opinion of just the sort Article III's "case or controversy" requirement forbids this Court to make.

II. The Eighth Circuit correctly remanded the *Naylor* litigation to the district court for a trial on the merits.

The only issue decided against petitioners by the Eighth Circuit was the propriety of summary judgment – *i.e.*, whether the case presented a triable set of factual allegations and proffers on the questions of the SSDs' motivation in refusing to admit the respondent black

children to the SSDs' schools. Unlike the district court, the court of appeals resolved that question based on this Court's summary judgment standard and, on that basis, remanded the case to the district court for resolution on its merits.

A. Unlike the district court, the Eighth Circuit correctly followed this Court's summary judgment analysis.

According to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In 1986, this court clarified the standards to be applied to motions for summary judgment under Rule 56. The Court held that the role of the district court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," *id.* at 255; and summary judgment may not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

The Court further held in *Anderson* that, in determining whether a reasonable jury could find for the nonmoving party, the district court may not apply a

substantive legal standard for assessing whether the non-moving party's proffered evidence makes out its case that is different from or higher than the standard the jury could apply were the evidence presented to a jury. *Anderson*, 477 U.S. at 255. Thus, "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.*

The "substantive evidentiary standards" that apply to respondents' intentional discrimination claims in this case are those set out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) and *Washington v. Davis*, 426 U.S. 229, 242 (1976). In both those cases, the Court made clear that circumstantial evidence of intentional discrimination can suffice. *Arlington Heights* at 266; *Davis* at 242. By refusing to credit circumstantial evidence of intentional discrimination, the district court was not "guided by substantive evidentiary standards that apply to the case."[7] Because the Eighth Circuit, by contrast, did adhere to the court's summary judgment analysis in *Anderson* and did adhere to its intentional discrimination analysis in *Arlington Heights* and *Davis*, the Eight Circuit's finding that "a material factual dispute remains"[8] in the *Naylor* litigation compelled its decision to remand for a trial on the merits and certainly presents no basis for review at this stage by this Court.

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[7] *Anderson*, at 266. The Eighth Circuit properly reversed the district court's grant of summary judgment on that basis. *Jenkins v. Missouri*, 904 F.2d at 420.

[8] *Jenkins v. Missouri*, 904 F.2d at 420.

B. The *Naylor* class presented genuine issues of material fact that precluded summary judgment.

Only a cursory examination of one or two of the *Naylor* class' allegations and proffers against each of the three SSDs is necessary to demonstrate genuine issues of material fact.[9]

1. **The evidence of the North Kansas City District's Intentional Discrimination.** When the North Kansas City School District ("NKCSD") rejected members of the *Naylor* class, it had a written policy on nonresident admissions that had existed since 1978. Rather than applying its policy to the requests by the black KCMSD student respondents for admission, however, NKCSD created a special and far more onerous – indeed, prohibitive – policy for those students and those students alone.[10] Even by itself, and apart from plaintiff's other proffered evidence of NKCSD's discriminatory intent,[11] NKCSD's

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[9] In his concurring opinion below, Judge John R. Gibson systematically examined much of the evidence before the district court and agreed that it presented genuine issues of material fact. *Jenkins*, 904 F.2d at 422-424.

[10] NKCSD's special policy required: complete NKCSD authority to choose which students would be accepted; complete NKCSD authority to assign students to specific schools and grades; that parents of transfer students "pledge" to support their child's education and be immediately available for consultation; surrender of the right to direct "any complaint" or "inquiry" into the district's liability for violating the law to any authority other than NKCSD; payment by the applicants to NKCSD for its legal fees and expenses "attributable to the previous *Jenkins* litigation" and to the district's "investigation of voluntary programs;" and participation of school districts in the neighboring State of Kansas in a voluntary interdistrict transfer plan. J.A. at 1132-34.

[11] *See, e.g., Jenkins*, 904 F.2d at 424 (Gibson, J., concurring).

adoption of a new and prohibitive policy specifically tailored to the respondent black children[12] raised an inference of intentional discrimination sufficient to warrant adjudication of respondents' allegations. *See Arlington Heights*, 429 U.S. at 267 (actions differently applied by race and contrary to existing policy can raise inference of intent); *Griffin v. County School Bd.*, 377 U.S. 218, 230-232 (1964) (timing and procedure of changes in policies can suggest intent to withhold benefits from minorities).

2. **The evidence of the Independence School District's intentional discrimination.** Like NKCSD, the Independence School District ("ISD") created a new nonresident student policy in response to admission requests from the black members of the *Naylor* class. In ISD's case, however, the preclusive demands made on the *Naylor* class as a condition for admission were even greater than the NKCSD's demands.[13]

Additionally, the ISD long had exercised the discretion to admit out of district students (nearly all white), whose admission was *not* authorized by the school board's written nonresident-student policy, when the

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[12] In addition to the specific references to the prior *Jenkins* litigation, the plan explicitly limited its new policy to minorities. J.A. at 1135.

[13] ISD required as a prerequisite for admitting the respondent children that they somehow make arrangements for a new elementary school to be built and given to the district, that the applicants pay the district for its past *Jenkins* litigation expenses and that they indemnify the district against future *Jenkins* expenses, and, finally, that the applicant's attorney, Arthur Benson, no longer represent the children with respect to the ISD. *Jenkins*, 904 F.2d at 423 (Gibson, J., concurring).

nonresident students' categories of special educational needs warranted admission.[14] ISD refused, however, to apply this same practice to members of the *Naylor* class, all of whom were black. Application of facially neutral policies in a discriminatory manner can justify an inference of intentional discrimination. *See Arlington Heights*, 429 U.S. at 265-66 (citing cases).

3. **The evidence of the Lee's Summit School District's racial discrimination.** Lee's Summit School District ("LSSD") facially violated its nonresident policy when it refused members of the *Naylor* class. At the time of the applications, LSSD's written policy stated: "Nonresident students may be permitted to attend the district's schools upon payment of tuition as established by the Board." J.A. at 1088.

Rather than applying its written policy, LSSD offered a succession of justifications to refuse the *Naylor* applicants. First, the district refused because the State had taken the position that it would not pay the tuition of the *Naylor* students. After the applicants assured that they would pay "whatever reasonable tuition requirements Lee's Summit may determine," J.A. at 1154, the district modified its answer, stating that the black applicants were denied admission because they had not established "residency [or] property ownership" in the district. J.A. at 991. Therefore, LSSD declared yet a third explanation, namely, that "it is the district's policy to accept nonresident students only as required by law, and in the rare

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[14] Almost all of whom were white students. J.A. at 1387.

situation where a student's family moves out of the district [but the] student [wants] to continue in Lee's Summit schools." J.A. at 1462. Even apart from LSSD's departure from its longstanding written policy when black children asked to take advantage of the policy, LSSD's shifting explanations alone justify an inference of intentional discrimination and therefore preclude summary judgment. *See Arlington Heights*, 429 U.S. at 264-65.

With respect to each district, therefore, the *Naylor* plaintiffs presented more than ample evidence from which a reasonable factfinder could infer intentional discrimination. Because this Court's summary judgment standards require reviewing courts to believe all of the nonmovant's evidence and make all justifiable inferences in the nonmovant's favor, summary judgment was impermissible.

C. Neither *Wygant* nor *Goldsboro* are in conflict with the Judgment of the Eighth Circuit.

The petitioners seek artificially to create a conflict between the judgment below and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In *Wygant* this Court disapproved of a remedial order that required giving employment preferences to minority teachers. Here the court of appeals simply remanded the complaint to the district court to hear the factual issues and to determine if there is a violation of the Constitution. If such a violation is found then and only then will the question of appropriate remedies be presented. Similarly, no conflict exists with *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324 (4th Cir. 1984). There the Fourth Circuit held

that a school district had no duty to remedy a racial imbalance in a neighboring district. That issue is not presented here. The court of appeals has only remanded this case for a determination of whether these districts violated the Fourteenth Amendment by intentionally denying respondents admission because of their race. Neither *Wygant* nor *Goldsboro* speak to this issue. Petitioners are desperately seeking solace where none is to be found.

Summary

Importantly, no court has ordered any of the petitioners to participate in a voluntary interdistrict transfer plan. Nor has any court made findings of fact adverse to petitioners. Rather, the court of appeals has simply directed the district court to inquire into the motivation that has led the SSDs to follow long held policies and admit white interdistrict transfer students but to abandon those same policies and refuse to admit black transfer students. Fairly read, therefore, the petitioners ask this Court to advise them of the proper outcome on a hypothetical situation in which a hypothetical court renders a hypothetical order – premised on something *other* than the SSDs' motivations – of a sort that no party or court in this case has suggested could permissibly be rendered. Further, petitioners seek this advice *before* trial on a complaint raising allegations that depart from the petitioners' hypothesized contentions in all relevant respects. Whether such issues as petitioners raise will ever be ripe cannot be known, but they surely are not ripe now.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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(3)

No. 90-391

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In The

Supreme Court of the United States

October Term, 1990

LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT R-7, SCHOOL DISTRICT OF THE CITY OF INDEPENDENCE, NORTH KANSAS CITY SCHOOL DISTRICT, MEMBERS OF THEIR RESPECTIVE BOARDS OF EDUCATION AND SUPERINTENDENTS, et al.,

Petitioners,

v.

JENNIFER T. NAYLOR, et al.,

Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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SUMMARY OF ARGUMENT

As Judge Bowman noted in his dissent, "The illegitimacy of what the panel has done is so painfully obvious. . . . "[1] The sleight of hand relied on by respondents' brief in opposition cannot obscure that illegitimacy. In pursuit of a purpose not assigned to the federal judiciary by our constitution – namely, achieving "racial balance" by coercing a "voluntary" affirmative action plan in the absence of a constitutional violation[2] – the panel invoked its judicial power without constitutional foundation. It also virtually ignored the district court's detailed opinions finding for petitioners and entering sanctions against respondent's counsel for filing a frivolous action. By using its power in such an unrestrained manner, the panel coerced local governmental entities that had committed no constitutional violation.

That unrestrained and extraordinary judicial action departs from established constitutional principles and, to be sure, constitutes legal error. But it represents much more than that. It represents an unprecedented reallocation of the Constitution's division of powers between the

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[1] App. C to petitioners' petition for a writ of certiorari at 8c (Bowman, J., dissenting from the denial of rehearing en banc). The appendix to that petition is cited hereinafter by reference to that appendix (App.) and the specific page number. For example: App. at 8c.

Judge Wollman joined Judge Bowman's dissent. The forcefulness of that dissent, combined with the panel's unusual practice of withdrawing its original opinion and issuing a substitute, highlight the inappropriateness of the panel's action. They also underscore the need for this Court's review.

[2] App. at 6a (Eighth Circuit panel's opinion).

federal and state governments. This Court's writ of certiorari is thus necessary to review such expansive judicial action and rectify the panel's extraordinary and intrusive coercion of local governmental units. When such judicial action is taken without a constitutional violation or other justification for judicial action, as the panel did in this case, it threatens the foundation of federalism. It "tinker[s] with local arrangements . . . at great risk to the health of the body politic." App. at 5c (Judge Bowman's dissent). This tinkering is particularly troublesome in cases like this one, which attract national attention and have nationwide implications.[3]

REPLY TO PETITIONER'S STATEMENT OF REASONS FOR DENYING THE WRIT

I. THOUGH PETITIONERS HAVE NEVER VIOLATED THE CONSTITUTION, THE EIGHTH CIRCUIT PANEL NONETHELESS COERCED PETITIONERS TO PARTICIPATE IN A "VOLUNTARY" INTERDISTRICT AFFIRMATIVE ACTION PLAN (replying to pp. 4-7 of respondents' brief in opposition).

Respondents begin by stating a fact that is both correct and indisputable – petitioners have not violated the Fourteenth Amendment. They then leap to the fanciful conclusion that, therefore, the panel did not coerce

[3] The events in related cases have required review by this Court on two prior occasions. *Missouri v. Jenkins*, 110 S.Ct. 1651 (1990); 109 S.Ct. 2463 (1989). The issues presented by this petition are of wider consequence and importance. In addition, the panel's actions represent an even more extraordinary example of judicial action than that presented by the latter *Jenkins* case – the imposition of a tax by a federal court.

petitioners to participate in an interdistrict affirmative action plan. Though that conclusion would follow from a correct application of *Milliken v. Bradley*,[4] two sources reveal that the panel did not apply *Milliken* but instead used unrestrained judicial coercion to achieve a preconceived result.

First, proof of judicial coercion is found in the panel's opinion itself. In a "painfully obvious" fashion, the panel emphasized repeatedly that a decision by petitioners not to "volunteer" for the panel-devised "voluntary" interdistrict plan "would be a very significant factor in determining [petitioners'] discriminatory intent . . . . " App. at 7a (quoting *Jenkins v. Missouri*, 807 F.2d 657, 687 (8th Cir. 1986) (concurring opinion), *cert. denied*, 484 U.S. 816 (1987)). Similarly, the panel considered in reality only the fact that petitioners had not yet "volunteered" for a voluntary interdistrict transfer plan before unleashing its coercive language. App. at 9-10a.[5] The panel simply was unwilling to consider whether petitioners would volunteer for an interdistrict transfer program "on their own". App. at 10a. Instead, the panel directed "the district court *itself* to formulate and *implement* a plan." *Id.* (emphasis supplied). *See also* App. at 15a ("[T]he interests of the students of the KCMSD and [petitioners] will be well served if all the parties see fit to participate in the [voluntary interdistrict transfer] plan to be promulgated by the

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[4] 418 U.S. 717 (1974).

[5] Specifically, the panel said, "[O]ne thing is clear from the record. Since June 14, 1985, not a single [one of petitioners] has admitted a single black [transfer] student from KCMSD pursuant to a [voluntary interdistrict transfer] plan . . . . " On the other hand, the panel conceded that some of petitioners or other suburban school districts might volunteer if ever presented with a suitable transfer plan.

district court . . . . "). This Court should review such an unprecedented exercise of judicial power, particularly because of its nationwide application to federal and state relationships.

Not only is respondents' fanciful interpretation contradicted by the panel's opinion itself, but Article III of the Constitution makes respondents' explanation for the panel's extraordinary action untenable.[6] The opinion repeatedly expresses the panel's will that a "voluntary" transfer plan be implemented and that petitioners "volunteer" for it. If that cannot be accomplished by judicial arm-twisting or "bullying", the Eighth Circuit panel made it clear, then it will be achieved by contriving a violation out of petitioners' decision not to volunteer for an interdistrict transfer program emphatically denominated as "voluntary." *See* App. at 10a (The "time has come for the district court itself to formulate and implement" a transfer plan.). To believe that the panel has not already decided to order petitioners to participate in a "voluntary" plan, if that is the only way to gain their participation, one must believe that the panel rendered an advisory opinion when it repeatedly warned petitioners about the consequences of not participating. In light of

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[6] U.S. Const. art. III, § 2. Since the time of Chief Justice John Jay, this Court has construed that article to preclude federal courts from issuing advisory opinions. *See, e.g., Princeton University v. Schmid*, 455 U.S. 100, 102 (1982). *See also* 3 H. Johnston, Correspondence and the Public Papers of John Jay 486-89 (1891) (cited in J. Nowak, R. Rotunda, J. Young, *American Constitutional Law* § 2.12, at 56 n.9 (3d ed. 1986)). Respondents themselves recognize this principle. *See* respondents' brief in opposition at 9.

the constitutional prohibition against such opinions, respondents' view of the panel's opinion only underscores the necessity for review by this Court.

Respondents now say that they read some language in the panel's opinion to suggest petitioners have a choice whether to volunteer. The reality of this case exposes that argument as nothing more than certiorari-dodging. The panel has effectively announced that petitioners, if they do not volunteer, will be ordered to participate because any decision not to volunteer will be viewed as a constitutional "failure". *See* App. at 10a. Judge Bowman recognized this irony when he said the panel "has made [petitioners] an offer they can't refuse . . . . " App. at 5c (Bowman, J., dissenting).

The "Alice-in-Wonderland quality," *id.*, of that dilemma deprives petitioners of an essential right in our federal system of justice: an assurance of objectivity. Instead, petitioners are given a constitutionally deficient substitute for a fair hearing – a federal court turned knight errant in pursuit of a purpose it perceives as good. *See* App. at 15a (petitioners' interests "will be well served" if they "see fit to participate"). The absence of constitutional justification for the panel's actions means that its members must have based their opinions not on principles of law, but on their view of social policy. This roving quality substitutes improperly three judges' personal values for the Constitution's commands. Only this Court's review can prevent such a substitution from becoming an acceptable practice for federal courts – not only in this case and the thousands of students it affects,

but also for school districts and other entities considering affirmative action plans across the country.[7]

II. RESPONDENTS' BRIEF IN OPPOSITION MERELY UNDERSCORES THE UNTENABLE NATURE OF THE EIGHTH CIRCUIT PANEL'S ACTIONS IN DEALING WITH IMPORTANT ISSUES OF FEDERALISM AND AFFIRMATIVE ACTION (replying to pp. 7-12 of respondents' brief in opposition).

Respondents, trying to deflect attention from the constitutional shortcomings of the panel's opinion, rely on two procedural arguments. The first is based on a fictional account of the panel's opinion. The second is premised on an analysis never embraced by the panel's majority.

Respondents argue first that the panel's coercive discussion of the voluntary transfer plan was issued in its discussion of the *Jenkins* case. Thus, it purportedly imposed obligations on the State of Missouri only – not on petitioners – and petitioners may not seek review of that portion. *See* respondents' brief in opposition at 7-8. This contention simply ignores that the panel's coercive discussion is aimed, quite explicitly, at petitioners. Consider, for example, the following: "Although we cannot say with certainty that the State *and the suburban school districts* would never agree to a VIT plan on *their* own, after five years, we believe that further delay cannot be

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[7] The panel's second opinion attempts to recast the panel's actions in a more constitutionally palatable form by deleting some of the most overtly coercive components of the first opinion. This is nothing more than an attempt to dodge this Court's review and it cannot obscure the underlying reality of the panel's action. As Judge Bowman put it in his dissent, "the modified opinion is as flawed as its predecessor." App. at 4c.

countenanced." App. at 10a (term "suburban school districts" used by panel to refer to petitioners *and* other school districts not even parties to this case). A fair reading of the opinion shows that the panel aimed its federal judicial power at petitioners. The panel may have taken aim at the State of Missouri as well, but that does not eliminate the panel's unjustified coercion of petitioners.[8]

Second, respondents would have this Court believe that the panel engaged in a reasoned analysis of the facts and law before entering its coercive holding. *See* respondents' brief in opposition at 4-5 (arguing Eighth Circuit "[e]xplicitly rel[ied]" on this Court's decisions in the recent cases on summary judgment standards), 11-15. Respondents bury in a footnote, however, the telling quality of that purported analysis – that it was not adopted by the panel's majority. *See* respondents' brief in opposition at 12 n.9. Indeed, only one member of the panel even purported to evaluate respondents' claim under any legal principles at all. *See* App. at 15-25a

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[8] Even assuming for argument that the decision below was truncated in the manner argued by respondents, this Court may consider questions outside a grant of certiorari "when resolution of those questions is necessary for the proper disposition of the case." *Piper Aircraft Co. v. Renyo*, 454 U.S. 235, 246 n.12 (1981).

Moreover, respondents' argument is not well taken in the circumstances presented in this case. Respondents requested the Eighth Circuit to consolidate this case with issues on appeal in *Jenkins v. Missouri*. *See* letter of respondents' counsel to Chief Deputy Clerk of Eighth Circuit, dated September 14, 1989. It is inappropriate for them to claim now that petitioners may not seek review of all portions of the opinion which aggrieve them.

(concurring opinion of Judge Gibson). The undeniable fact of the matter is that a majority of the panel did not join the concurring opinion's analysis.

Instead, the majority rendered its holding in an opinion that did not cite a single case for a rule of law. *See* App. at 4-13a. The majority did not, as respondents suggest, recognize *Village of Arlington Heights v. Metro. Housing Dev. Corp.*[9] or *Washington Davis*[10] – much less apply and abide by them. No one can pretend that the panel's majority followed those cases or any others, because it never discussed any cases for a point of law. This absence of legal authority emphasizes that the decision below was based not on the law, but on the policy values of the panel's members.[11]

III. THOUGH RESPONDENTS REQUEST THIS COURT NOT TO REVIEW THE DECISION BELOW, THEIR BRIEF IN OPPOSITION ACTUALLY DEMONSTRATES THAT CERTIORARI SHOULD BE GRANTED TO REVIEW THE IMPORTANT ISSUES PRESENTED (replying to pp. 12-15 of respondents' brief in opposition).

Respondents attack petitioners by using statements petitioners purportedly made about the "voluntary"

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[9] 429 U.S. 252 (1977).

[10] 426 U.S. 229 (1976).

[11] To the majority's credit, it realized the district court had applied the law to the facts correctly. Thus, the majority did not even attempt to portray its opinion as anything but an exercise in social engineering. On the other hand, Judge Gibson deserves some credit for trying to make some part of the court's decision resemble an appellate opinion. Unfortunately, that transformation required him to rewrite the facts and ignore the undisputed facts admitted by respondents in the district court. The district court's opinion reflects the record actually created in the district court, as contrasted to Judge Gibson's attempt to recast the record at the appellate level.

interdistrict transfer plan as proof of their discriminatory intent. *See* respondents' brief in opposition at 12-15. Ironically, this tactic disregards the panel's explicit and unappealed ruling that statements by petitioners about the contents of such a transfer plan "may not be used as evidence of racial animus. . . . " App. at 12a. Thus, the Court need not consider the erroneous and misportrayed characterizations asserted by respondents' brief in opposition. The district court concluded – and respondents did not challenge – that two petitioners' suggestions for voluntary transfer plans, made in good faith, were subject to review and revision. *See* App. at 28-29d.[12]

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[12] Respondents state that a school district, not one of petitioners, recently began participating in a transfer program. *See* brief in opposition at 4 n.6. That district agreed to accept ten transfer students. This number is quite different from the massive transfer program outlined by the panel in its original opinion. App. at 10-11b n.4. In addition, respondents fail to note that they approved all of the provisions in that district's transfer plan. Many of those provisions are similar to those proposed by two of the petitioners in this case, ones which respondents now attack as "discriminatory."

Ironically, that a school district has begun accepting transfer students merely highlights the inappropriateness of a federal court trying "to bully [petitioners] into submission not to the law but to the Court's will." App. at 8c. Thus, the panel not only acted without constitutional justification, it also interfered with local governmental affairs by devising a "blunderbuss" cross-district transfer plan. It thereby deprived local governments of the chance to consider or develop their own plans in a coercion-free environment.

CONCLUSION

The panel decided this important case, and its wide-ranging issues, with but one goal in mind: to impose a "voluntary" transfer plan on petitioners. As a result, the panel ignored the Constitution and, simply put, ran roughshod over petitioners. As Judge Bowman observed, "[T]his decision, if it is not overturned, will stand as a monument to the often tempting but always pernicious doctrine that arguably worthy ends justify illegitimate means." App. at 5c. Only by issuing a writ of certiorari can that unfaithfulness to the Constitution's allocation of power be rectified.

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